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245 - 20175.

A. E. BERTLING,
Defendant in Error,

vs.

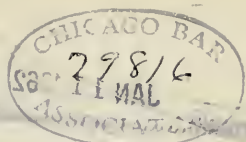
OXWELD ACETYLENE COMPANY,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

193 I.A. 7



2/1/13

MR. JUSTICE SCANLAN delivered the opinion of the court.

A. E. Bertling, defendant in error, hereinafter called the plaintiff, sued the Oxweld Acetylene Company, a corporation, plaintiff in error, hereinafter called the defendant, in an action of the fourth class in the Municipal court of Chicago, to recover damages sustained by him as the result of a collision between an automobile belonging to the plaintiff and an automobile belonging to the defendant. The damages claimed were the costs of repairing the plaintiff's machine. The negligence charged in the statement of claim was that the servant of the defendant, in charge of its automobile at the time of the collision, carelessly and negligently operated or drove the automobile of the defendant upon and against the automobile of the plaintiff. In its affidavit of merits the defendant denied that its machine was carelessly and negligently operated and controlled on the occasion in question and alleged that the plaintiff carelessly and negligently drove his automobile upon and against plaintiff's automobile, and further alleged that the injury to the plaintiff's automobile was caused by an unavoidable accident. The case was tried before the court without a jury, and the issues were found in favor of the plaintiff and his damages were assessed at the sum of \$112.50. A motion for a new trial was overruled and judgment was entered upon the finding, and this writ of error followed.

The collision between the automobile of the plaintiff and the automobile of the defendant occurred on January 24, 1913, about noon time, on Ashland boulevard, just north of Taylor street,

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in the city of Chicago. Both machines were going north at the time of the collision, and whether or not the collision was due to negligence on the part of the defendant's servant was a controverted question of fact in the case.

The defendant has assigned and argued a number of alleged errors, but in our judgment it is only necessary for us to pass on one of these. The plaintiff was allowed to testify over the objection of the defendant that after the collision the chauffeur in charge of the defendant's automobile got out of his automobile and walked to where the plaintiff was standing by his own machine and said: "My steering knuckle broke and I couldn't help it; send the bill to the Oxweld Company; I called the attention of my boss to the condition of the steering knuckle, and that it was defective; send in your bill to the Oxweld Company and they will fix it up all right." The trial court expressed doubts as to the competency of this evidence, but finally admitted it on the grounds that it was a part of the res gestae. At the conclusion of the case, the defendant submitted several propositions of law to the effect that the said evidence was incompetent, irrelevant and immaterial and should be stricken from the record and not considered by the court in making its findings, but the court refused to hold the said propositions.

The defendant contends that the admission of the said evidence was error, "first, that it was not relevant or material to the issue joined under plaintiff's statement of claim, a variance between the proof and allegations; second, that the time elapsed between the accident and the conversation was too long to admit it as a part of the res gestae; third, that it was a recital of a past transaction, and fourth, that the admissions of the chauffeur and Mr. Hoyt were not binding on the defendant corporation." The plaintiff contends that the defendant did not raise the question of variance until all the evidence was in and that it thereby

waived the said variance, and further, that the statements of the chauffeur were part of the res gestae and therefore admissible.

Aside from the question as to whether the defendant waived the variance, we are satisfied that the statement of the chauffeur to the defendant was not a part of the res gestae in this case and should not have been admitted by the trial court. What was said by the chauffeur were not utterances of a spontaneous character that were called forth by the transaction itself and that served to characterize or show the nature of the same, but on the contrary the evidence complained of appears to be a statement of a deliberate kind, having all the earmarks of declarations that have been held to be not a part of the res gestae. While it must be conceded that it is sometimes difficult to determine whether or not a certain statement in a given case is a part of the res gestae, nevertheless, we think it plain, under the authorities, some of which we cite, the statement of the chauffeur was not admissible as part of the res gestae in this case. Springfield Consolidated Ry. Co. v. Puntenney, 200 Ill. 9; Levy v. Morand Bros., 195 Ill. App. 283; Ondon v. Chicago Ry. Co., et al., 181 Ill. App. 330; Leckliedner v. Chicago City Ry. Co., 142 Ill. App. 139; Penn. Co. v. McCaffrey, 173 Ill. 169; Belshis v. Dering Coal Co., 248 Ill. 62. Nor can we say, after a careful examination of the record, that the error of the court in admitting the evidence complained of was not prejudicial to the defendant, and the judgment of the Municipal court of Chicago will, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

[illegible]

20161

328 - 20231.

JONES, COATES & BAILEY,
a Corporation,

Appellant,

vs.

KELLOGG SWITCHBOARD & SUPPLY
COMPANY, a Corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

193 I.A. 9

MR. JUSTICE SCANLAN delivered the opinion of the court.

Jones, Coates & Bailey, a corporation, appellant, hereinafter designated as the plaintiff, sued the Kellogg Switchboard & Supply Company, a corporation, appellee, hereinafter called the defendant, in the Municipal court of Chicago, in an action of the first class. A jury was waived and the cause was submitted to the court; a finding and judgment in favor of the defendant resulted and this appeal followed.

The plaintiff is a corporation engaged in the lumber and box making business in the city of Chicago, and the defendant is a corporation engaged in the manufacture of telephones, switchboards and telephone supplies in the same place. The suit was brought to recover damages for the alleged failure of the defendant to perform a contract made with the plaintiff in March, 1910. It appears that about March 1, 1910, Mr. Bailey, the treasurer of the plaintiff corporation, called on Mr. Schoenwerk, the purchasing agent of the defendant corporation, for the purpose of selling the defendant the "knock down boxes" that it would require in its business for a year. Bailey and Schoenwerk held a number of conferences on the subject, at which times they discussed the kinds of boxes the defendant would need in its business, and from time to time the plaintiff sent to the defendant sample boxes of various kinds - in all about 500. On March 24, 1910, the plaintiff wrote to the defendant the following letter:

1931.1.1.1

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE SURVEY.

The survey was conducted in the following manner: A series of interviews were held with the following persons: [List of names] The results of the survey are as follows: [List of results]

The following is a summary of the results of the survey: [Detailed summary of survey results, including percentages and observations]

"Chicago, March 24, 1910.

Kellogg Switchboard & Supply Co.,
434 South Green St.
Chicago.

GENTLEMEN:

We beg leave to submit you prices upon knocked down boxes for your requirements for a year. These boxes to be the same as the ones we are delivering to you today; the lumber to be matched.

In case you should require any wooden frame fibre boxes for express shipments, the price will be 5% more. In case you desire any boxes made from 1 inch lumber, for export and other shipments where you should have heavy lumber, our price for these boxes, knocked down and delivered at your place will be all figured upon a basis of \$25 per thousand lumber feet, with 15% added for waste. These boxes are to be made of good solid lumber, free from knot holes and rot, and are to be dressed and matched.

Yours truly,
JONES, COATES & BAILEY,
(Signed) R.R. Bailey.

No. 91	25 x 11	x 13 1/2	24¢
No. 92	25 x 19 1/2x 11	.....	31¢
No. 93	25 x 19 1/4x 19 1/2	.....	43¢
No. 97	25 x 12 1/8x 13 1/2	.....	36¢
No. 98	25 x 19 1/2x 12 1/8	.....	33¢
No. 99	25 x 21 1/4x 19 1/2	.....	45¢

On the following day, the defendant, through its purchasing agent, handed to Mr. Bailey the following letter:

"Chicago, March 25, 1910.

Jones, Coates & Bailey,
1014 N. Halsted St.,
Chicago, Ill.

GENTLEMEN:

We shall be pleased to purchase from you, our requirements of knock down boxes, styles as per sample submitted and at prices per list submitted March 24, for at least a year from date.

Yours very truly,
KELLOGG SWITCHBOARD & SUPPLY CO.,
By (Signed) O. C. Schoenwerk,
Purchasing Agent."

On the receipt of this letter, Mr. Bailey thanked Mr. Schoenwerk for giving his company the contract and stated that his company wished to buy the lumber to fill the contract and it would like to know how much the contract would amount to; to which Mr. Schoenwerk responded, "You can safely count on at least \$10,000 or \$12,000 worth of business." Thereafter, on June 1, 1910, as the plaintiff received no orders from the defendant, although Mr. Bailey had repeated conferences with Mr. Schoenwerk on the subject, it wrote to

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES
OF THE STATE OF NEW YORK:
I have the honor to acknowledge the receipt of your
favorable report of the progress of the
work of the State Library, and to thank you for
the interest and assistance which you have
afforded me in the discharge of my duties.
I am, Sir, very respectfully,
Your obedient servant,
J. B. ALLEN,
State Librarian.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the final step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation.

the defendant the following letter:

"Chicago, June 1, 1910.

Kellogg Switchboard & Supply Co.,
Congress & Green Sts.,
Chicago.

GENTLEMEN:

We desire to call your attention to our contract for furnishing you with all your requirements in knock down boxes, per your acceptance of March 25, 1910, and request that we receive your specifications for delivery without further delay. It is now two months since ~~you~~ entered into this contract and since the date thereof we have continuously been ready to furnish you boxes according to the agreement, and have frequently called your attention thereto and requested your specifications. We shall expect to hear from you promptly, with directions.

Yours truly,
JONES, COATES & BAILEY,
(Signed) R.R. Bailey,
Vice-President."

To the above letter the defendant replied as follows:

"Chicago, June 2, 1910.

Jones, Coates & Bailey,
1014 Hocker St.,
Chicago, Ill.

GENTLEMEN:

Replying to yours of the 1st would state that in our letter of March 25th, we merely agreed to purchase from you, our requirements of knocked down boxes of the style as per sample submitted by you and this would leave us the privilege of purchasing any other styles of boxes, which are different from said sample. We also state, merely our requirements and no specific quantity. Should we have any requirements of your style, we certainly shall purchase them from you.

Yours truly,
KELLOGG SWITCHBOARD & SUPPLY CO.
By (Signed) O. C. Schoenwerk,
Purchasing Agent."

No orders were ever received by the plaintiff from the defendant under the contract and this suit was commenced on October 24, 1911.

The defendant on the trial of the cause contended that the written contract between the parties, evidenced by the letters of March 24th and March 25th, 1910, was plain and unambiguous; that by its terms the defendant did not agree to purchase from the plaintiff all the "knock down boxes" it would require in its business for a year from March 25, 1910, but the defendant was only obliged to buy of the plaintiff "its "requirements" of "knock down boxes" of the kind and style specifically mentioned in the plaintiff's letter of March 24th; that it was not precluded from buying

of other persons than the plaintiff "knock down boxes" of different kinds and prices from those mentioned in the plaintiff's said letter.

The plaintiff contended that the written contract was plain and unambiguous; that by its terms the plaintiff agreed to furnish and the defendant to buy all the "knock down boxes" the defendant would require in its business for one year from the date of the contract; the plaintiff further contended that if there is any doubt from the language of the written contract as to the intention of the parties, the evidence of the circumstances surrounding the making of the contract absolutely clears up any possible ambiguity in the same, and from the language of the contract, and from the circumstances surrounding the making of the same, it plainly appears that the intention of the parties was, as contended for by the plaintiff.

The trial court sustained the defendant's construction of the written contract, and the finding in the case was the result of this ruling.

We think the trial court erred in his construction of the written contract between the parties, evidenced by the letters of March 24th and March 25th, 1910. As we interpret the same, the plaintiff in the letter of March 24th submitted an offer to the defendant to furnish it with the "knock down boxes" it would need in its business for a year: it stated the make up of the boxes it proposed to furnish; the materials to be used in the same; the various sizes of the boxes to be furnished and the cost of each size. The defendant, by its letter of March 25th, agreed to purchase from the plaintiff the knock down boxes it would need in its business for a year; the material, sizes and prices of the said boxes to be governed by the terms of the letter of the plaintiff of March 24th; the styles of the boxes to be "as per sample submitted." The word "requirements" in contracts of this character

of other persons and the plaintiff "does not mean" to either
and shall not intend that those included in the plaintiff's suit
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has a well defined meaning. Minnesota Lumber Co. v. Coal Co., 160 Ill. 85; Purcell Co. v. Sage, 200 Ill. 342.

We are unable to agree with the defendant's interpretation of the contract as stated in its letter of June 2, 1910. Under such a construction the defendant could avoid buying any boxes under the contract by simply purchasing from other parties boxes of a slightly different style from those stated in the proposition of the plaintiff. In our judgment, such an interpretation is neither reasonable nor fair and should not prevail.

While we are of the opinion that the intention of the parties in this case may be gathered from the written contract, nevertheless we think that the evidence tending to show the circumstances surrounding the execution of the agreement supports our interpretation of the contract.

As the finding of the trial court was based upon a misconstruction of the written contract, the judgment of the Municipal court of Chicago must be reversed and the cause remanded and, in our view of the case, it is entirely unnecessary for us to notice certain other contentions raised by the defendant. The judgment of the Municipal court of Chicago will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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FRANK KEISHKOWSKI,

vs.

HARRY BOSTROM,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

On Appeal of HARRY BOSTROM,
JOHN W. SUTTON, Petitioner,
Appellee.

193 I.A. 12

MR. JUSTICE SCARLAN delivered the opinion of the court.

Frank Keishkowski sued the appellee^{ant}, Harry Bostrom, in the Circuit court of Cook county and recovered a judgment against him for \$700. John W. Sutton was the attorney of record for Keishkowski in the said suit. The appellant took an appeal from the said judgment, and while the same was pending, Keishkowski, against the advice and wishes of Sutton, settled the judgment for \$150. \$75 of this amount was offered to Sutton in full of all claims for legal services he might have against Keishkowski but he refused the offer, stating that he had a contract with Keishkowski by the terms of which he was entitled to one-half of the amount of the judgment. Sutton then filed in the Circuit court of Cook county a petition to enforce against the appellant, Harry Bostrom, a claim for attorney's lien, under section 55, chapter 92, Hurd's Revised Statutes. ^{Ch. 9 611} The appellant filed an answer to the said petition. A jury was waived and the cause was submitted to the court. Evidence was presented in support of the petition and the answer, and thereafter "the court listened to arguments of counsel * * * at the conclusion of which the court stated he would render his decision later." Thereafter the court notified both parties that he would render his decision in the case on August 27, 1915. On the last mentioned date, the parties to the proceedings being represented in court by counsel, the court announced that he found that the petitioner Sutton had failed to prove his case, and that there would have to be a finding against the petitioner

and in favor of the defendant. Thereupon, the attorney representing Sutton asked for a continuance of the case on account of the absence of Sutton and the court granted the request. On October 18, 1913, the following occurred: "This case again was called for rendering of decision by the court; all parties present. John W. Sutton then asked leave of court to withdraw his petition and take a non-suit, to which request the defendant by his attorney objected, stating as grounds therefor, that as the petitioner and the defendant had both argued the case fully to the court, submitted their briefs and authorities, and that the case has been fully and finally submitted to the court for final decision which the court was now ready to render, the petitioner is not now entitled to withdraw his petition, dismiss or non-suit his case; and as the court had announced his readiness to render his decision, and even expressed what the decision would be, this case should now be decided by the court and not dismissed." The trial court overruled the said objection of the defendant and granted leave to the petitioner "to withdraw and dismiss his petition and non-suit his case," which was done over the objection of the defendant. This appeal followed. The appellee, the petitioner in the lower court, has not filed an appearance in this court.

The defendant contends that the record clearly shows that the case (one tried by the court without a jury) had been submitted to the court for final decision before the motion for a non-suit was made, and that under such circumstances the petitioner was not entitled to the benefit of a non-suit.

The question before us for determination is governed by section 70, chapter 110, Hurd's Revised Statutes. That section reads as follows:

"Every person desirous of suffering a non-suit shall be barred therefrom, unless he do so before the jury retire from the bar, or if the case is tried before the court without a jury, before the case is submitted for final decision."

and is based on the following assumptions:

1. The population of the country is 100 million.

2. The population is growing at a rate of 1% per year.

3. The population is distributed as follows:

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Plainly, under this section and the facts of the case, the petitioner Sutton was not entitled to a non-suit. The record shows that before the petitioner made his motion for a non-suit, all the evidence in the case had been heard, arguments had been made, and the case had been submitted to the court for final decision. It further appears that the court considered the case for some time; that he then served notice on the counsel that he would decide it on a certain day and that on the said day he did, in fact, announce a decision of the case. The statute plainly states that where a case is tried by a court without a jury, the person desiring the benefit of a non-suit must assert the right "before the case is submitted for final decision." It is obvious that if a party were allowed to take a non-suit as was done in this case, he might wait until he learned that the court's finding would be against him and then take a non-suit, and he might (by again starting suit) continue this practice indefinitely until he found a nisi prius court that would render judgment in accordance with his views. The provision in section 70 relating to the trial of a case, without a jury, was evidently passed by the legislature for the purpose of preventing such a practice. As we read the record in this case, the trial court actually announced his decision, and the defendant was entitled to the benefit of the same, but even if it could be held that the action of the trial court on August 27, 1913, did not amount to a final decision in the case, nevertheless, it is absolutely clear that the case had been submitted for final decision, before the petitioner Sutton made his motion for - non-suit, and, therefore, under the statute, the motion for a non-suit came too late.

The judgment of the Circuit court of Cook county will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JOHANNA RAU LONGHI,
Appellee,

vs.

EMILIO LONGHI,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

193 I.A. 21

MR. JUSTICE SCANLAN delivered the opinion of the court.

Johanna Rau Longhi, appellee, hereinafter called the complainant, filed a bill for separate maintenance in the Circuit court of Cook county against Emilio Longhi, appellant, hereinafter called the defendant. The bill charges adultery, cruelty and desertion, and states that the present suit is the second separate maintenance proceeding brought by the complainant against the defendant; the first one having been dismissed after the parties had resumed the marital relationship. The defendant filed an answer to the present bill, in which he admitted that he had committed adultery, but alleged that the offense had been condoned by the complainant; denied all the charges of cruelty, except one; as to the latter he admitted that he had slapped the complainant on a certain occasion in a fit of anger; denied that he deserted the complainant or that she was living apart from him without her fault, and alleged that the parties to the proceeding were living apart by agreement. The chancellor, who heard the case, entered a decree finding the defendant guilty of cruelty and desertion as charged in the bill, and that the complainant was living apart from the defendant without her fault, and awarded the complainant \$30 a month for the support of herself and \$20 for the support, education and maintenance of her daughter, a girl of 15 years of age, and further ordered the defendant to pay to the complainant the sum of \$125 for solicitor's fees. The defendant appeals from this decree.

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

2. The second of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

3. The third of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

4. The fourth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

5. The fifth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

6. The sixth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

7. The seventh of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

8. The eighth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

9. The ninth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

10. The tenth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or not.

The defendant asks for a reversal of the decree upon two grounds; first, that the parties to the proceedings, prior to the commencement of the same, were living separate and apart by an agreement made between them, and that by the terms of the same, the defendant provided the complainant with property sufficient for her separate maintenance; that the said agreement was fairly and voluntarily entered into, without coercion, duress or fraud, and that the provisions in the same for the maintenance of the wife were fair and equitable in view of the property of the husband, the needs of the wife and the station in life of the parties; that the said agreement was binding upon the parties and precluded her from maintaining the bill in the present case; second, that even though the said agreement did not preclude the complainant from maintaining her present bill, nevertheless, the proof shows that, prior to the filing of the bill, the defendant gave to the complainant "an amount of property far in excess of what any court would decree;" that it is not shown that the complainant is in want or destitute, but on the contrary the proof shows that she is possessed of more property than the defendant, and therefore it is not equitable or just that the defendant should be compelled to provide anything further for her maintenance; but that in any event, "the decree is excessive considering the circumstances and the respective financial conditions of the parties." The defendant has not argued that the complainant is not entitled to live separate and apart from him, and his sole complaint relates to the allowance made by the chancellor for the support of the complainant and the young daughter of the parties.

It is undoubtedly the law of this state that an agreement for separate maintenance made between a husband and wife, who are living apart, which is fairly and voluntarily entered into, and which is free from fraud or duress, and which makes an equitable provision for the wife, considering the station in life of the

The following was the substance of the report made
to the Board. It was found that the Commission had
not been able to obtain the necessary information
to enable it to make a proper estimate of the
costs of the proposed scheme. It was therefore
recommended that the Commission should be
authorized to make a further investigation into
the matter.

The Commission was further informed that the
Board had decided to refer the matter to the
Committee of Enquiry. It was recommended that
the Commission should be authorized to make a
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the Commission should be authorized to make a
further investigation into the matter.

parties, is valid and is a bar to a separate maintenance proceeding brought by the wife, - it being remembered always that a husband or wife cannot, by an agreement between them, deprive a court of chancery of its power over the care, custody and support of minor children of the parties. As to the first contention of the defendant, the chancellor by entering a decree in favor of the complainant in this case, held, in effect, that there was no agreement between the parties that would preclude the complainant from enforcing the present proceedings, and after a careful examination of the evidence bearing on this subject, we are satisfied that the conclusion of the chancellor in this regard is fully warranted by the proof. While it is true that the defendant, prior to the commencement of the present proceedings, transferred certain real estate and other properties to the complainant, nevertheless, we are unable to say, from the proof, that the said transfers were made as the result of an agreement for separate maintenance between the parties. As we have heretofore said, the defendant has not argued in this court that the complainant is not entitled to a decree for separate maintenance, and we think that by assuming this position, he concedes that there was not a valid and binding agreement between the parties as to separate maintenance, for, if there was, the complainant would not be entitled to sustain her present bill.

The real contention of the defendant is, that considering all that he has done for the complainant, in the way of transferring property to her prior to the commencement of these proceedings and considering further the financial condition of the parties at the time of the entry of the decree, the allowance awarded the complainant by the chancellor is excessive and inequitable. There can be no doubt that the defendant, on certain occasions prior to the commencement of these proceedings, transferred to the complainant properties of considerable value, but it is also clear that none of these properties was income-producing at the time of the entry of

the decree. The once valuable business acquired by the complainant through the defendant had been lost to her, and her interest in the real estate transferred to her by the complainant produced her nothing. The small interest in the remainder that she has in her father's estate was also unproductive. We think the chancellor was warranted from the proof in finding that the complainant had no present source of income from any of the properties in which she was interested, and that her physical condition was such that she was unable to work to earn a livelihood. The amount of the allowance that shall be decreed in cases of this character rests in the sound judicial discretion of the chancellor, and while his action in this regard is always subject to review, the amount allowed will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion. The present case was heard by an able and experienced chancellor, and we do not feel that we are justified, under the proof, in disturbing the allowances in the decree. It must be remembered in this connection that the chancellor may, upon application, make such alteration in the allowance for maintenance as shall appear reasonable and proper, and, therefore, if at any time in the future the financial condition of either the complainant or the defendant should materially change, it is entirely within the power of the chancellor to make such changes in that part of the decree that refers to the allowances as equity and the circumstances of the parties shall require.

Finding no error in this record, the decree of the Circuit court of Cook county will be affirmed.

AFFIRMED.

411 - 20351.

BROWNELL MACHINERY COMPANY,
a corporation,

Appellee,

vs.

AZA O. WALWORTH, doing business
as A. O. WALWORTH & COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

193 I.A. 23

MR. JUSTICE SCANLAN delivered the opinion of the court.

The Brownell Machinery Company, a corporation, appellee, hereinafter called the plaintiff, sued Aza O. Walworth, doing business as A. O. Walworth & Co., appellant, hereinafter called the defendant, in the Municipal court of Chicago, in an action of the first class. The plaintiff in its statement of claim alleged that the defendant was indebted to it in the sum of \$2087.59 for certain machinery sold by the plaintiff to the defendant. The case was tried before a court and jury, and sometime during the morning of November 13, 1911, the jury retired to consider of their verdict. Thereafter, about noontime of the same day, the jury returned into court, "and announced that they had reached a verdict, which verdict was handed to the clerk, opened, and read in open court as follows: 'We the jury find the issues for the plaintiff and assess its damages at \$581.82,' which verdict was received by the court. The jury then retired and was allowed to separate for lunch and was directed to return at 2 P.M. The clerk made a memorandum of said verdict upon the half-sheet and minute book." At 2 o'clock on the afternoon of the same day, the jurors, who had tried the case, were called back into the box by the court and the following occurred:

"THE COURT: Gentlemen of the jury, in this case I dislike very much to be compelled to take this course, but I see no other way. We have been a day and a half trying the case, and the verdict could not stand. This is your first day, and perhaps you haven't yet learned that certain verdicts can't stand. Unless the verdict is respon-

nive to both the law and the facts, it can't stand; and it is the duty of the judge to set it aside. Of course, many verdicts are set aside. Some jurors sometimes think that their verdicts are final; they are not at all. The court has the power to set it aside, and it is not only the power, but it is the duty of the court to set a verdict aside if it does not respond to the evidence and the law involved. This verdict does not. There is no possible ground or theory upon which a verdict for \$581. could be sustained in this case. Either it must be a verdict for the whole amount, or a verdict for no amount whatever.

The parties in litigation in any trial may compromise their own cases; that is up to them. Neither the judge nor the jury has the right to compromise the parties' cases. We may find simply for one party or another, but it is none of our business, this matter of compromising cases. We can't compromise their cases for them; they can compromise their own cases. You have the right to find the rights of the parties in cases, and then it is up to them to compromise, if they choose. We can't compromise, and I am not criticising you because perhaps in this case you sought to compromise between the parties; but such verdicts are set aside one right after the other.

Now, in this case, either this plaintiff is entitled to recover the full amount or it is not entitled to recover anything at all. I said to counsel here, there might be possibly a question here as to the right of the plaintiff to recover for the services of a watchman during the time when this machinery was in this building; that was the only question in the case. The question, however, was not controverted upon the trial, and therefore nothing was said about it. I have therefore stricken from the claim of the plaintiff, of \$1365.29, the amount charged for watchman, \$132., leaving a balance of \$1233.29.

MR. MCCORMICK: Let the record show that the plaintiff consents to striking out that amount.

THE COURT: And I will therefore direct you to sign a verdict for that amount. This amounts then, gentlemen, simply to this, that the court directs the verdict; and that being so, it is a question then for the defendant; if the court has made an error, of course the defendant will take advantage of that error upon appeal. You may therefore sign this verdict for \$1233.29."

Thereupon the jury, acting under the instructions of the court, returned a verdict for the plaintiff for \$1233.29, and the clerk of the court, also acting under the orders of the court, erased from the half-sheet and minute book the memorandum of the verdict for \$581.62. Proper objections were made and exceptions were preserved by the defendant to the aforesaid action of the court. A motion for a new trial was overruled; judgment in favor of the plaintiff for \$1233.29 was entered, and this appeal followed.

The defendant contends that the verdict of the jury in favor of the plaintiff for \$581.62 was duly pronounced by the jury,

11-11-61

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to develop a plan of action.

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received by the court and recorded by the clerk, all in open court, and the jury was then allowed to separate, and that it was error for the court to thereafter, at two o'clock, to recall the jurors into the box and to direct a verdict for the plaintiff for \$1233.29, and to cause the clerk to erase the record he had made of the verdict for \$581.62.

We think the contention of the defendant is meritorious. It is plain that the verdict had been pronounced, received and recorded when the jury were allowed to separate at the noon adjournment. The trial court in his statement to the jury at two o'clock recognized this fact, and his action, at that time, in effect, amounted to a setting aside of the verdict of the jury and a direction to the members of the jury that had tried the case and had been excused from service in the case, to find a verdict for the plaintiff for \$1233.29.

Until a verdict is received and recorded, it is not considered valid and final, and it lies in the power of the jury to alter, amend or correct the same, but not afterwards. If a verdict is returned by the jury which is defective or informal, the court may send the jury back with directions as to how the verdict should be made up. If a verdict is good in substance, the court may after verdict - even at a subsequent term - if the case is still pending, amend the verdict as to matters of form but not as to matters of substance.

If in the present case the trial court did not approve the verdict pronounced and received (and it is clear from the court's statement to the jury that he did not), he had the right to set the same aside, but he was without power to call back into the box the members of the jury that had tried the case and direct them to return a verdict as he did. When the verdict of the jury was pronounced and recorded, and the jurors excused, the court's power over the jury in the present case was at an end. No authority has been cited by

the counsel for the plaintiff, nor are we aware of any, that would authorize the action of the court that is complained of in the present case.

Counsel for the plaintiff argues that the trial court should have directed a verdict for the plaintiff for \$1233.29 when all the proof was in, and that therefore the present judgment is just and right and should be allowed to stand, even though the action of the court complained of, be held to be irregular. We think the action of the court was a serious violation of settled rules of procedure, and we would not be disposed to entertain an argument that the judgment should be sustained in spite of the said action, unless it clearly appeared that the defendant was without a defense to the plaintiff's claim, and, after a careful examination of the record in this case, we are unable to hold that such is the fact. As we have said before, if the court were of the opinion that the verdict of the jury was an improper one, he had the power to set it aside, but the defendant, in that event, had the right to have a retrial of the cause, and to have the issues in the case submitted to a jury.

The judgment of the Municipal court of Chicago will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MEXICAN IMPORT COMPANY,
a corporation,

Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY, a
corporation, PENNSYLVANIA COMPANY,
a corporation, and PITTSBURG, SIN-
CINNATI, CHICAGO & ST. LOUIS RAIL-
WAY COMPANY, a corporation,

Appellees.

Appeal from

Municipal Court

of Chicago.

193 I.A. 26

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

✓ On November 1, 1918, the plaintiff, Mexican Import Com-
pany, a corporation, commenced an action of the first class in the
Municipal Court of Chicago against the defendants above named to
recover damages occasioned by reason of their alleged failure to
exercise proper care in the handling and transportation of two car-
loads of tomatoes, shipped from Chicago to New York City, and by
reason of alleged unreasonable delay in the transit thereof, where-
by the tomatoes were either chilled or frozen. The defendants in
their joint affidavit of merits denied that the damage, if any,
to the tomatoes was occasioned by any failure on their part to ex-
ercise proper care while the same were in their possession and con-
trol, or that there was any unreasonable delay in the transit of
the same, and alleged that if the tomatoes were at any time dam-
aged said damage was incurred prior to the time of their delivery
to the defendants, and that the tomatoes were delivered to the con-
signee in the same condition as when delivered to the defendants.
The case was tried before a jury and at the conclusion of plain-
tiff's evidence, on motion of the defendants, the court instructed
the jury to find the issues for the defendants, which they did,
and a judgment in favor of the defendants was accordingly entered.

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Plaintiff seeks by this appeal to reverse the judgment.

Plaintiff's evidence disclosed the following facts in substance: Refrigerator car "P.F.E. 10028," loaded with tomatoes from Los Mochis, Mexico, and consigned to plaintiff at Chicago, arrived in Chicago over the tracks of the Chicago, Rock Island and Pacific Railroad Company on Saturday evening, December 30, 1911, and was placed on a team track of said railroad company. The initials "P. F. E." are the initials of the words Pacific Fruit Express. On Sunday morning, December 31, 1911, A. O. Davies, an inspector of fruit and vegetables and employed by plaintiff to examine the condition of the tomatoes in said car, went to said team track in company with one Taylor, manager for plaintiff. They there met the foreman of the team track; the seal of the car was broken, one of the doors was opened, and Davies and Taylor went into the car. Davies testified in substance that he was inside the car from 20 to 30 minutes; that during all this time said door remained open; that it was "very cold," that the temperature was less than twenty degrees above zero, and that it was "awful windy"; that there was an alcohol-fed heater in the bunkers of the car, which raised the temperature of the car; that the tomatoes were loaded in boxes, each box containing four square baskets and each basket containing about 15 or 20 tomatoes, each wrapped in paper; that there was space for ventilation between the tiers of boxes; that he examined the various boxes in the usual manner and saw about 4 or 5 per cent. of the load; that none of the tomatoes which he examined were chilled or frost-bitten; that from his examination he reached the conclusion that all of the tomatoes were in a good, merchantable condition and fit for shipment to New York City and other eastern markets; that upon coming out of the car he personally closed the door and said foreman put seals on the car; and that then the witness left and did not again see the car. Three days after said examination, on January 3, 1912, plaintiff gave orders

through the Chicago office of the Pacific Fruit Express that said car be reconsigned to plaintiff at Philadelphia, Pennsylvania, and the car was started for that destination. On the afternoon of January 5, 1912, plaintiff telephoned the office of the Pennsylvania Company in Chicago directing it to divert said car, then en route to Philadelphia, to "Mexican Import Company, New York City; notify Lyon Brothers, New York City." Plaintiff's evidence did not show that any further examination was made of the contents of the car until it reached New York City or what was the condition of the tomatoes when plaintiff gave said reconsignment order, or what was the temperature in Chicago from December 31, 1911, to January 3, 1912. The car arrived in New York City and was unloaded on the morning of January 8, 1912, at the piers of the defendant Pennsylvania Railroad Company. It was found that the tomatoes were greatly damaged, that those which had been near the doors of the car were frozen and that the others were badly chilled. Subsequently, the entire carload was sold for \$43.15.

Refrigerator car "P.F.E. 3987," also loaded with tomatoes from some point in Mexico and consigned to plaintiff at Chicago, was placed on a team track of the Chicago and Eastern Illinois Railroad Company in Chicago on January 24, 1912. Davies testified in substance that at the request of plaintiff he examined the contents of this car on January 24, 1912; that the temperature was then about 24 degrees above zero; that he was engaged in said examination from 20 to 30 minutes, during which time one of the doors of the car was open; that there was an alcohol-fed heater in the car which raised the temperature of the car; that he made an examination similar to that made of the contents of car No. 10026, and found the tomatoes in good condition and fit for shipment to New York City. Two days thereafter, on January 26, 1912, plaintiff, through said Chicago office of the Pacific Fruit Express, reconsigned said car, No. 3987, to "Mexican Import Company, New York City; notify Lyon Brothers Company." It does not appear

that any further examination was made of the contents of this car until it reached New York City and was unloaded on the morning of February 1, 1912; neither does it appear what was the condition of the tomatoes on January 26, 1912, or when the car reached the tracks of any of the defendants. When the car was unloaded in New York City some of the tomatoes were found to be badly chilled and damaged. The tomatoes were sold for \$762.25.

Counsel for plaintiff do not contend that the shipments of said tomatoes, contained in said two cars, were continuous shipments from Mexico to New York City. They state in their reply brief: "When shipping directions were given by plaintiff for these cars at Chicago, to send them to New York, they were on the team tracks of the Chicago, Rock Island & Pacific and the Chicago & Eastern Illinois Railroads, respectively. Those railroads were the initial carriers in the transit to New York City, and they moved the cars from Chicago to the next carrier en route." Counsel's position, as we understand it, is, that defendants were connecting and delivering carriers, that a sufficient prima facie case against them, as such carriers, was shown by the evidence, and that the court erred in instructing the jury at the close of plaintiff's case to find for the defendant.

Plaintiff's evidence does not disclose that there was any unreasonable delay in the transit of either car from Chicago. ✓ When the initial carrier receives goods in good order, the law presumes that each successive carrier, intermediate between the initial and last carrier, receives them in good order; and this presumption, working through to the last carrier who delivers them in bad order, casts the burden upon it to prove that it provided all suitable means of transportation and exercised that degree of care which the nature of the goods required, or to prove that the damage occurred before it received the goods. (St. Louis, etc., R. Co. v. Coolidge, 73 Ark. 112, 115; Ruddell v. Baltimore & Ohio R. Co., 175 Ill. App. 456, 457.) But the burden, in the first

instance, is upon the plaintiff to show injury to the goods while the same are in transitu; that is, to show that the goods were in good condition when delivered to the initial carrier for shipment and that they were in a damaged condition at the destination.

(Cooper v. Georgia Pacific R. Co., 98 Ala. 329, 330; Lake Erie & Western R. Co. v. Oakes, 11 Ill. App. 489, 490; Michigan Central Ry. Co. v. Oamus, 129 Ill. App. 79, 80; Cheble v. Oregon R. & N. Co., 51 Wash. 359, 364.) In the present case, plaintiff did not show that the tomatoes were in good condition in Chicago at the times when the Chicago, Rock Island & Pacific and the Chicago & Eastern Illinois railroad companies, respectively, as carriers, received said tomatoes for shipment. The testimony of the witness, Davies, tended to show that the tomatoes in the two cars were in good condition, three and two days respectively, before said railroad companies received the tomatoes as initial carriers for shipment. We are of the opinion, under all the facts and circumstances, that such evidence is too remote to raise the presumption that the defendants, as successive carriers, received the tomatoes in good condition. (Lake Erie & Western R. Co. v. Oakes, supra.) Furthermore, to raise that presumption it must be presumed that the tomatoes remained in good condition during said three and two days respectively intervening between their examination by Davies and their shipment by said railroad companies. One presumption cannot be the basis for a second presumption. (Condon v. Schenckfeld, 214 Ill. 226, 229; Globe Insurance Co. v. Gerisch, 163 Ill. 625.) And we do not think that plaintiff's evidence as to damages was sufficiently definite upon which to base any verdict. Our conclusion is that plaintiff did not make a sufficient prima facie case against any of the defendants and that the trial court did not err in taking the case from the jury and entering the judgment appealed from.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

299 - 20231

^m
HUGO OPPENHEIM and BERNARD
STRAUSS, copartners, trading
as Oppenheim & Strauss,
Defendants in Error,
vs.
J. H. MOWER,
Plaintiff in Error.

Renewing
opinion

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 48¹

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

One question only is presented by this writ of error, namely: May a trial court, after judgment has been entered in favor of one party, amend the judgment upon motion of counsel, unsupported by evidence or affidavit, so that the judgment is changed in favor of another and entirely distinct party?

✓ The action in this case was started in the court below to recover for goods, wares and merchandise sold and delivered by Oppenheim & Strauss, a corporation. After a hearing, the trial court, on February 2, 1914, entered a finding against the defendant and in favor of Oppenheim & Strauss, a corporation, and upon this finding a judgment was entered on the same day. On February 5th, three days after judgment had been entered, the attorney for the plaintiff, on due notice given the defendant, the plaintiff in error here, appeared and moved the court upon his unsworn statement alone to enter an order amending the praecipe, statement of claim, summons, record and entry of judgment by striking from all the papers and record the words, "a corporation," as a description of the plaintiff below, and inserting instead the words "Hugo Oppenheim and Bernard Strauss, a Co-partnership, trading as Oppenheim & Strauss." The court sustained the motion and ordered the amendments and the judg-

B-fed. 6/4/15.

ment to be corrected.✓

The change attempted to be made in the judgment rendered in the cause was not to correct "any defect or imperfection in matter of form contained in the record," authorized by Sec. 11, Chapt. 7, on amendments and jeofails, which is the only section under which, after judgment, amendments may be made in proceedings, processes, entries, returns or other proceedings in a cause in order to correct them in affirmance of the judgment. Under this statute the only amendments allowable after judgment are those which, first, are matters of form, and, second, are matters in affirmance of the judgment. Zukowski v. Armour, 107 Ill. App. 663; Henry v. Seaton, 170 id. 1; Lake v. Morse, 11 Ill. 587.

Our statutes make a distinction as to the power of a court to allow amendments before judgment and after judgment. The statute permits amendments before judgment "either in form or substance for the furtherance of justice," but after judgment the order or judgment may only be "modified for any defects or imperfections in matter of form." The attempted amendment of this record was not an amendment for a defect or imperfection in matter of form. It was a substitution of new parties plaintiff. The suit was brought by an entity recognized in law and the judgment was entered in favor of such party. A corporation is a different entity or party from the shareholders of the corporation even though all the stock is owned by one person. A co-partnership is different and distinct from a corporation of the same name; hence, the amendment attempted to substitute in the record and the judgment new parties plaintiff. This was unauthorized by the statute and could not be done at common law.

The judgment is reversed and the cause is remanded.

HUGO OPPENHEIM and BERNARD
STRAUSS, copartners, trading
as OPPENHEIM & STRAUSS,
Defendants in Error.

vs.

J. H. ROSEN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 48 ²

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

One question only is presented by this writ of error, namely: May a trial court, after judgment has been entered in favor of one party, amend the judgment upon motion of counsel unsupported by evidence or affidavit so that the judgment is changed in favor of another and entirely distinct party?

The action in this case was started in the court below to recover for goods, wares and merchandise sold and delivered by Oppenheim & Strauss, a corporation. After a hearing the trial court, on February 2, 1914, entered a finding against the defendant and in favor of Oppenheim & Strauss, a corporation, and upon this finding a judgment was entered on the same day. On February 5th, three days after judgment had been entered, the attorney for the plaintiff appeared and moved the court upon his unsworn statement alone to enter an order amending praecipe, statement of claim, summons, record and entry of judgment, by striking out from all the papers and record the words "a corporation" as descriptive of the plaintiff below, and inserting instead the words "Hugo Oppenheim and Bernard Strauss, copartners, trading as Oppenheim & Strauss." The court sustained the motion and ordered the amendments made and the judgment to be corrected.

The amendments were made upon due notice given the

Dec. 9/4/15.

THE UNITED STATES OF AMERICA

OF THE DISTRICT OF COLUMBIA

IN SENATE,
January 10, 1845.

BY

JOHN C. CALHOUN,

REPORTER.

1845-1846

THE HOUSE OF REPRESENTATIVES, IN SENATE,

January 10, 1845.

REPORT OF THE HOUSE OF REPRESENTATIVES, IN SENATE,
January 10, 1845.

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January 10, 1845.

REPORT OF THE HOUSE OF REPRESENTATIVES, IN SENATE,

January 10, 1845.

defendant, plaintiff in error here. Under the statute, the Municipal Court of Chicago has no terms but the period of thirty days is substituted as the time within which the court can modify, alter or vacate a judgment or entertain a motion for that purpose. (The People v. Wells, 255 Ill. 450.) The motion to amend complained of on this writ of error was made within three days after the judgment was entered, and simply involved correcting and changing the name of the plaintiff so as to make the record speak the truth. The amendments were made while the evidence was fresh in the mind of the court, and were based, doubtless, upon the proof that had been offered. We know nothing of the evidence, for the evidence given in the case was not preserved in the record. The record as here presented shows only the order of the court, on the hearing of the motion, to correct the record. In the absence of a bill of exceptions containing all the evidence heard by the court on the trial, there is no presumption in favor of the theory that the court acted on the motion without evidence. We think the contrary presumption is to be indulged in, that the court permitted the amendments because the evidence offered before the court on the trial of the cause justified it. (Davis v. Lowery Coffee Co., 67 S. E. Rep. 922; Southworth v. The People, 183 Ill. 621; Cox v. Highway Commissioners, 194 Id. 355). If the judgment, as finally entered, had no foundation in the evidence, it was for the plaintiff in error to make that appear in the record filed herein. The judgment is affirmed.

AFFIRMED.

ANTANAS RIMKUS for use of
EVA ZAUNINTE,

Appellee,
vs.

A. OLSZEWSKI, doing business
as A. OLSZEWSKI BANK,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

193 I.A. 49

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action was brought by appellee Rimkus for the use of Eva Zauninte against appellant to recover the amount of a savings account deposited by appellee Rimkus with appellant, who conducted a banking business. The account was assigned verbally to Eva Zauninte, for whose use the action was brought, for a valid consideration, and the pass-book showing the account was delivered to her by Rimkus. On the trial the jury returned a verdict for the plaintiff and judgment was entered on the verdict. It is urged that the verdict and judgment are not supported by the evidence.

The evidence shows, without any contradiction or controversy, the assignment of the account and the delivery of the pass-book, as above stated, and the amount of the account. A parol transfer of the account for a valuable consideration was made, and this is sufficient in law. (Briggs v. Barr, 19 Johns. Rep. 95; Taft v. Bowker, 132 Mass. 277; Morris, Admr. v. Cheney, 51 Ill. 451.) The evidence further shows notice of the assignment to defendant, appellant. In our opinion, the evidence sustains the judgment.

Error is assigned on the giving of the second instruction, which relates to the consideration of the assignment. It is contended that there is no evidence in the record on which to base the instruction. We find sufficient evidence in the

THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1891
REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1890

1891

ALBANY: PUBLISHED BY THE STATE OF NEW YORK, 1891.

THE STATE OF NEW YORK
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IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1890

record, in the testimony of Eva Zauninte, to warrant the giving of the instruction.

The judgment is affirmed.

AFFIRMED.

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THESE ARE THE RESULTS OF THE INVESTIGATION, IN WHICH THE

REPORT OF THE INVESTIGATOR

THE REPORT IS ATTACHED,

1891.

FLORENCE A. PANGBURN, Administratrix
of the Estate of JOHN FRANKLIN PANGBURN,
deceased,

Appellee.

vs.

KNICKERBOCKER ICE COMPANY, a corpora-
tion,

Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

193 I.A. 50

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the Knickerbocker Ice Company, from a judgment for \$8000 recovered against it for wrongfully causing the death of John Franklin Pangburn, plaintiff's intestate. ✓ Levi and Company were in control of an ice-house in which the defendant Ice Company delivered ice through a door in the east end of the building near the roof. The building had a flat roof and immediately over the door was a 6 X 6 beam 18 feet long, which was securely fastened to the roof. The east end of this beam extended about 2 feet beyond the building. Apparently it was found that the beam did not extend out far enough from the building, and perhaps also that the chain from which the pulley block was suspended did not raise the pulley block high enough to permit the ice brought up by the tackle to go in at the door, and a plank 4 feet 3½ inches long was nailed to the top of the beam, the east end of which extended east of the east end of the beam 18 inches, leaving 2 feet 9½ inches of the plank resting on and nailed to the beam. On top of this plank a block of wood was placed and the chain from which the pulley block was suspended was passed around the block and plank a few inches east of the east end of the beam. The beam, plank and block on top of the plank

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The first of these is the fact that the
 evidence is not consistent with the
 hypothesis that the defendant was
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 shooting. The evidence is
 inconsistent with the hypothesis
 that the defendant was present
 at the time of the shooting.
 The evidence is inconsistent
 with the hypothesis that the
 defendant was present at the
 time of the shooting.

had been in the position described at least 18 years before the accident. During all this time the defendant provided the pulley block, rope, tongs, and other appliances for raising the ice and attached the pulley block to the chain. The defendant Ice Company and it alone used the beam, plank, chain, pulley block and tackle for the purpose of raising ice. On the day of the accident certain of the Ice Company's employees, including the deceased, were engaged in unloading a car of ice which stood just east of the ice-house and hoisting ice by means of the tackle and putting it into the ice-house through the door above mentioned. In this work a horse was used to hoist the ice. In doing so it was found that the ice could not be raised high enough to go in at the door without the pulley block striking against the plank from which it was suspended. About one-third of the carload of ice had been raised before the accident, and each time that ice was hoisted the pulley block struck against the beam with such force as to cause a jar and the Ice Company's superintendent decided that the trouble should be remedied and directed the deceased to go up on the roof and remedy it. In obedience to the order deceased went on the roof and attempted to remedy the trouble by inserting another block of wood between the chain and the block of wood over which it passed, for the purpose of raising the chain and the pulley block suspended from it. The deceased inserted a block of wood under the chain and signalled the men below to hoist the ice. He then laid down, either on or alongside of the beam and plank with one hand resting on the plank and with his head and body extended about a foot from the building so that he could see as the ice was hoisted whether the trouble had been remedied.

When a lot of ice had been hoisted to within a few feet of the door, the strain on the projecting east end of the plank pulled that part of the plank which was nailed to the beam loose from the beam, and the plank, chain, pulley block, ice, etc., fell to the ground, a distance of 35 or 40 feet, carrying with them plaintiff's intestate, and in the fall he was so injured that he died from the effect of his injuries.

The plank did not break, but the strain on the outer end of the plank acting on the end of the beam to which the plank was nailed, as a fulcrum, pulled that part of the plank which was nailed to the beam loose from the beam and permitted the plank and appliances attached to it to fall to the ground. An examination of the plank and beam showed that the plank was rotten; that a part of the nails by which it was fastened to the beam were pulled through the plank and remained sticking in the beam and other nails were pulled out of the beam and remained in the plank. The position of the deceased on or alongside of the plank did not tend to pull the plank loose from the beam, for his weight rested on that part of the plank which was nailed to the beam and not on that part of the plank which extended beyond the end of the beam. ✓

From the evidence the jury might properly find that the superintendent of the Ice Company ordered the deceased to go on the roof and correct the trouble with the hoisting apparatus, and that the Company knew, or by the exercise of due care could have learned, that the plank was so insecurely fastened to the beam that it was liable to be pulled loose therefrom. The Company owed to its servants the duty of exercising ordinary care to keep the beam and plank in a reasonably safe condition, and we think that from the

evidence the jury might properly find that the Ice Company was guilty of negligence in permitting the plank to be and remain insecurely fastened to the beam. We fail to find in the record any evidence from which the jury might find either that the deceased assumed the risk, or that he was guilty of contributory negligence. The duty of inspection was on the Ice Company, not the deceased, and he had a right to assume, in the absence of anything tending to show the contrary, that the plank was securely fastened to the beam. The deceased went on the roof in obedience to a positive order, and there is no evidence that he knew or should have known that there was danger of the plank being pulled loose from the beam.

✓ When the case was given to the jury the defendants were Levi and Company and the Ice Company. The jury returned two verdicts, one finding Levi and Company guilty and assessing plaintiff's damages as against them at \$3000; the other finding the Ice Company guilty and assessing plaintiff's damages against it at \$5000. Thereupon, the trial Judge orally instructed the jury that "there was a mistake in the rendering of the verdict, and stated orally and not in writing that if they found all the defendants guilty all must be included in one verdict, and they should then assess whatever damages they, the jury, found from the evidence and under the instructions of the court the plaintiff had sustained. The trial Judge then directed the jury orally to return and bring in such a verdict, all of which was done in the absence of the defendant, etc. * * * Thereupon the jury returned into the court and presented to the court the following verdict, signed by all the jurors: 'We, the jury, find the defendants guilty and assess the plaintiff's damages at the sum of \$8,000.' And as soon as the said proceedings came to the

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

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On August 17, 1964, the following information was received from the Bureau of the Census, Washington, D.C.:

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

The results of the present study showed that the use of the

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knowledge of the Knickerbocker Ice Company it then and there by its counsel excepted to said procedure, etc." The Court sustained the motion of Levi and Company for a new trial and the suit was then dismissed as to them, and denied the Ice Company's motion for a new trial and entered judgment on the verdict against the Ice Company. ✓ The oral instruction so given was as to the form of the verdict and was not an instruction "as to the law of the case" and the Court did not err in giving such instruction orally.

I. C. R. R. Co. v. Wheeler, 149 Ill. 525;

Conness v. I. I. & I. R. R. Co., 193 id. 467.

The record is free from reversible error and the judgment is affirmed.

AFFIRMED.

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, Washington, D.C., dated May 19, 1968.

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• For $\lambda \in \mathbb{C} \setminus \{0\}$, $\lambda \in \sigma_p(A)$ if and only if $\lambda \in \sigma_p(T)$. If $\lambda = 0$

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MARGUERITE SPRINGER, as Executrix
of the Last Will and Testament of
WARREN SPRINGER, deceased,
Appellant.

vs.

WALLACE L. DeWOLF, MARY F. KELLOGG
and LUCY E. BELL,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

193 I.A. 58

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ May 27, 1912, a judgment was entered in the Circuit Court in favor of Wallace L. DeWolf, Mary F. Kellogg and Lucy E. Bell against the estate of Warren Springer, deceased, and Marguerite Springer, executrix of the will of the said Warren Springer. After the expiration of the judgment term the judgment was amended by striking out the words "Estate of Warren Springer, deceased," and adding, "as a claim of the seventh class, to be paid in due course of administration." From this order an appeal was taken and the order was affirmed by Branch B. of this Court. DeWolf et al. v. Springer, 190 Ill. App. 116. Executrix, No. 20220, not yet reported. Before the amendment was made a copy of the judgment was filed in the Probate Court as a proof of the claim of the plaintiffs in the judgment against the Estate of Warren Springer. After the judgment was amended the claimants were given leave to file an amendment to their proof of claim as of the date of filing such claim. From this order an appeal was taken by the executrix of the will of Warren Springer to the Circuit Court, where the order appealed from was "confirmed" and leave given to file as an amendment to their proof of claim filed in the Probate Court, a copy of the order amending the judgment. From this order and judgment the executrix prayed and was

ALMA MATER
UNIVERSITY OF CALIFORNIA

THE UNIVERSITY OF CALIFORNIA
AT LOS ANGELES
OFFICE OF THE CHANCELLOR
125 SOUTH WEST STREET
LOS ANGELES, CALIFORNIA

1931.1.28

TO THE BOARD OF TRUSTEES OF THE UNIVERSITY

Very truly yours, *Wm. H. Hall*

Enclosed is a copy of the report of the Board of Trustees for the year 1930-31.

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allowed the present appeal to this Court.✓ The questions presented are, first, did the Probate Court err in allowing an amendment to the proof of claim; and, second, did the Circuit Court err in affirming the order of the Probate Court allowing such amendment.

That the Probate Court did not err in amending the judgment nor the Circuit Court in affirming the order of the Probate Court, was decided in McWolf et al. v. Springer, Executrix, No. 20220, and in that decision we concur. When the judgment was amended it was clearly proper to permit the claimants to file an amendment to their proof of claim, and the Circuit Court did not err in affirming the order of the Probate Court permitting such amendment.

The order and judgment of the Circuit Court is affirmed.

AFFIRMED.

During the summer months in 1877-1878 the weather was
 rather dry, and the crops were in general
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MARGUERITE SPRINGER, as Executrix
of the Last Will and Testament of
WARREN SPRINGER, deceased,
Appellant,

vs.

WALLACE L. DE WOLF, MARY F. KELLOGG
and LUCY E. BRILL.
Appellees.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

193 I.A. 60

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

✓ Marguerite Springer as Executrix of the will of Warren Springer, deceased, filed in the Probate Court her petition praying that the order and judgment of that Court entered July 24, 1912, allowing the claim of appellees as claimants against the estate of Warren Springer as of Class Seven for \$25,190.97 be vacated and set aside. The prayer of the petition was denied and the petition dismissed, and the Executrix prayed and was allowed an appeal to the Circuit Court. In that Court the order of the Probate Court appealed from was "confirmed," the prayer of the petition denied and the petition dismissed. This appeal is prosecuted from the order of the Circuit Court.

The appellees here recovered a judgment in the Circuit Court May 27, 1912, against the estate of Warren Springer, deceased, and Marguerite Springer, his executrix, for \$25,000. A copy of the judgment order was filed in the Probate Court as a claim against the estate of Warren Springer and allowed July 24, 1912, for \$25,190.97 as of Class 7, to be paid in due course of administration. After the expiration of the judgment term the judgment was amended by striking out the words "Estate of Warren Springer, deceased," and adding the words, "as a claim of the seventh class, to be paid in due course of administration." Before the amendment was made a

copy of the judgment of the Circuit Court entered May 27, 1912, was filed in the Probate Court as a proof of the claim of the plaintiffs in the judgment against the Estate of Warren Springer. After the judgment was amended the claimants, by leave of the Probate Court, filed a copy of the amended judgment order as an amendment to their proof of claim as of the date of the filing of their claim. ✓ The amendment to the judgment made by the Circuit Court was one of form only and was properly made after the judgment term, and the Probate Court properly permitted the claimants to amend their proof of claim by filing a copy of the judgment order as amended. The judgment of the Circuit Court was final and conclusive against the executrix and her petition to the Probate Court to vacate and set aside the judgment was properly denied by that Court and by the Circuit Court on the appeal from the order of the Probate Court.

The order and judgment of the Circuit Court dismissing the petition of the Executrix is affirmed.

AFFIRMED.

CITY OF CHICAGO,

Defendant in Error,

vs.

PETER DELICH,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 72

MR. JUSTICE McSHERLY DELIVERED THE OPINION OF THE COURT.

This is an action brought by the City of Chicago charging defendant with violation of the ordinances touching "resisting an officer" and "disorderly conduct." Upon the trial he was found guilty and fined \$75.

✓ The facts, in brief, are that a police officer met defendant in the rear of his premises and asked him to open two shanties located there. They were opened by defendant and examined by the officer. Shortly thereafter three officers came to defendant's house and stated that they had heard he was killing sheep in the basement, to which defendant replied that this was not so. The officers stated that they had been sent to make an investigation. Defendant took them down into his basement, and after inspection they informed defendant that they found no evidence of any killing of sheep or cattle. That no indications of sheep killing were seen was testified to by the officers upon the trial. After this inspection in the basement one of the officers informed the defendant that he was under arrest and attempted to put upon his hands a wrist-chain, and the other officers seized his hands so as to bind them with the wrist-chain. Defendant resisted this for three or four minutes, and then submitted quietly and walked up stairs and was taken to the police station in a patrol wagon. He was subsequently charged with violating the ordinances first above referred to. ✓

The City does not appear in this court to support this judgment, and we are unable to see how it can be justified upon the record before us. The statute giving authority to an officer to arrest without a warrant is as follows:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." Illinois Statutes, chapter 38, sec. 342.

See also Enright v. Gibson, 219 Ill. 550. These statutory conditions are not to be found in this case. The officers had no warrant for defendant's arrest. It does not appear that a criminal offense had in fact been committed. We know of no statute which makes it a crime to kill sheep in a basement, and no ordinance touching this subject appears in the record before us. As we have said many times, we cannot take judicial notice of city ordinances; but even upon the assumption that this is a criminal offense, there is not only no evidence that defendant committed such an offense, but there is affirmative evidence that he was guiltless of such an offense.

Under the statute, therefore, the officers had no right to arrest defendant, and the actions of defendant could not be called resisting an officer "in the discharge of his duty," which is the language of the ordinance defendant is charged with having violated.

The judgment is reversed.

REVERSED.

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CITY OF CHICAGO,
Defendant in Error,
vs.
NICKA DULICH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 74

MR. JUSTICE ROSSERLY DELIVERED THE OPINION OF THE COURT.

This has to do with the same facts as appear in case No. 20686, in which an opinion is this day rendered. The defendant in this case is the wife of the defendant in the other case, and she took some part in the altercation with the officers.

The same reasons which impelled us to reverse the judgment in the case against the husband must prevail in the case against the wife. In neither of these cases has the City appeared in this court to present any considerations why the judgment should be sustained. For the reasons stated in the other case the judgment is reversed.

REVERSED.

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CARRIE E. DRACASS,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

193 I.A. 75

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for damages for personal injuries received from a fall on the sidewalk on 61st street in Chicago. The verdict was for \$6,750, reduced by remittitur to \$5,750, for which amount judgment was entered.

Plaintiff charges that at the place of the accident the 61st street sidewalk passes under a railroad viaduct, and that defendant permitted a depression to be and remain in the sidewalk at this point, and permitted large quantities of snow and ice to accumulate in and around said depression, making it dangerous for persons using the sidewalk, and that she was thereby caused to fall, receiving injuries. The allegation as to the condition of the sidewalk was sufficiently proven by the evidence. Many witnesses testified that the walk was sunken and water would accumulate in the sunken place and freeze, making hummocks of ice, some say four or five inches high. One witness described the place as "full of holes and bumps eight to twelve inches in height." The jury could reasonably conclude that the defendant was guilty of negligence as charged. ✓

Plaintiff was not shown to have been guilty of contributory negligence. A fall of snow on the morning of the accident had covered somewhat the rough bumps of ice. Plaintiff knew of the danger of the walk, and says she was

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walking "very slowly and carefully trying to pick my way along. I walked in the least dangerous places." The freshly fallen snow covered the depression into which she stepped. She says, "my foot went down into it a distance of five or six or perhaps more inches." We think it not unreasonable to conclude that plaintiff was in fact very cautious and was exercising every care to avoid the danger.

The presence of the recently fallen snow, of which it is argued defendant could not have known and cannot be responsible for, did not cause the accident. It only tended to hide the danger and make it more difficult for pedestrians to escape an accident. The depression in the walk and the rough bumps of ice was the proximate cause of the accident, and this condition had existed for such a length of time as to charge the defendant with knowledge thereof. Similar cases in point are City v. Faller, 217 Ill. 273; Ryan v. City, 187 Ill. App. 163; City of Aurora v. Dale, 90 Ill. 46; City v. Anglim, 83 Ill. App. 55.

The criticism of the declaration as containing no allegation of notice to the city, while perhaps justifying a demurrer is of no avail after verdict. City v. Burhyte, 173 Ill. 553, is precisely in point.

It might also be said that in City v. Stearns, 105 Ill. 554, it is said that the words "permitted to remain out of repair" mean assent thereto, and "from this definition it is plain that if the city assented it did so from a knowledge of the condition of the walk,- the assent implied knowledge." This statement in the opinion is also applicable to the complaint made by the defendant to instruction No. 3 given at the request of plaintiff. We are not referring to the notice to a municipality required by the act "concerning suits at law for personal injuries and against cities, vil-

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THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED FROM THE ABOVE SOURCES:

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will then gather information about the problem and the people involved. This information will be used to determine the cause of the problem and to develop a plan of action.

lages and towns," in force July 1, 1905.

We see no reason to reverse because of rulings of the court on evidence or the alleged improper argument of counsel for plaintiff, and it cannot be said that the verdict was for so large an amount as to indicate passion and prejudice. Plaintiff received severe injuries,- a fracture of the tibia and fibula, with dislocation and tearing of the ankle ligaments, and other injuries. For several months she was obliged to use a wheel chair, then crutches, and at the time of the trial, nine years after the accident, she was obliged to use a cane in walking. She suffered great pain and has been permanently injured. The damages are not excessive.

The judgment is affirmed.

AFFIRMED.

CLARENCE E. SHAFFNER,
Appellant,

vs.

E. L. GREENWALD,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

193 I.A. 77

MR. JUSTICE MOORELY DELIVERED THE OPINION OF THE COURT.

This is a replevin suit to recover an automobile and accessories. The defendant, Greenwald, claimed title in himself, and upon this issue the case was tried before a jury, which found the right of possession in the defendant. Judgment was entered and writ of retorno issued.

✓ From the evidence presented the jury reasonably might have believed the salient facts to be as follows: that plaintiff was a clerk employed in the office of his father, Mr. Benjamin E. Shaffner, an attorney at law practicing at this bar; that prior to May 1, 1912, plaintiff owned the automobile in question, which he had sent to a repairing company for overhauling; that this work was not paid for and the repairing company secured a judgment for \$102.75 against plaintiff, and levied upon and took possession of the automobile. Some time before this, at the request of Benjamin E. Shaffner, the plaintiff and the defendant, Greenwald, endorsed his note for the sum of \$250, which note was then discounted by a man named Ensign. Ensign finally sued on the note and had judgment against both Shaffner and Greenwald. Shaffner thereafter sent a letter to Greenwald requesting that he should help in preventing a levy threatened by Ensign upon his judgment. An arrangement was made by which Benjamin E. Shaffner was to pay this judgment in installments, but Shaffner failing to do this the defendant, Greenwald, was compelled to

pay the judgment. About May 1, 1912, the defendant was at the office of the Shaffners, to persuade them to repay him the amount he had paid on the Ensign judgment. Plaintiff told defendant that he had no money, but told him about the automobile which had been levied upon by the repairing company. Defendant offered to cancel his claim on the Ensign matter and to pay the repairing company the amount of its judgment if plaintiff would give defendant a bill of sale for the automobile; and on that date an unconditional bill of sale conveying the automobile in question was executed by the plaintiff and delivered to Greenwald, and on the following day Benjamin Shaffner executed a written order on the repairing company to turn over the automobile to the defendant. The defendant paid the repairing company its claim and received the automobile. Four days thereafter plaintiff swore to an affidavit for the replevin of the automobile and obtained possession of it. ✓

We have considered the evidentiary facts presented by the plaintiff to induce us to conclude that the verdict of the jury was not justified by the evidence, but after consideration we are not persuaded that the verdict is incorrect. We are of the opinion that the jury was justified in believing that the bill of sale was an absolute conveyance of the property in question, and not a mortgage, as was claimed by the plaintiff.

A further consideration which would prevent any judgment favorable to plaintiff is this, - that even should it be conceded that the bill of sale was in fact a mortgage, plaintiff was not entitled to the possession of the chattels until he had tendered to defendant the amount due on the mortgage, and kept that tender good. This plaintiff failed to do.

Plaintiff argues that the jury was improperly

instructed as to the measure of damages, and says that the verdict was improper in assessing the defendant's damages at \$150. It appears that subsequently an order was entered remitting this amount of damages, so that we cannot see that plaintiff has anything to complain of upon this point.

We do not find any reversible error in the rulings of the court on the admissibility of evidence.

The judgment is affirmed.

AFFIRMED.

652 - 20990

ANTON SUFOLSKI,
Appellee,
va.
FRACUSON & LANGE FOUNDRY
COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

193 I.A. 79

MR. JUSTICE KOSURSKI DELIVERED THE OPINION OF THE COURT.

✓ Plaintiff had judgment for \$3,000 in a suit for damages for injuries received while employed in the foundry plant owned and operated by the defendant. In the yard of this plant was an appliance for breaking scrap iron, called a "drop"; by means of a derrick a heavy metal ball was raised to some considerable height and allowed to fall on the pile of scrap below, breaking the iron into bits. This would cause pieces to fly in all directions. Plaintiff was a "chipper" employed in cleaning castings, and his usual place of work was in the yard perhaps about 20 feet west of the drop. A piece of flying iron struck him as he was going, as he says, to his tool-box nearby, inflicting the injuries complained of.

We shall notice only the claim of plaintiff that the accident was caused through the failure of defendant to comply with the provision of the statute entitled "an act to provide for the health, safety and comfort of employes in factories," etc., approved June 4, 1909, in force January 1, 1910. This provision is as follows: "All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employe is obliged to pass, or to be employed, shall, where practicable, be properly enclosed, fenced or otherwise guarded." No enclosure or fence

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Received 10 May 1993; accepted 10 July 1993

Journal of Management Studies, 19(6), 701-718.

guarded the drop. Nearby was a shanty, the presence of which it is argued satisfied the requirement to have the dangerous place "otherwise guarded." This shanty was about six or ten feet west of the drop, was about four feet wide, seven feet long and seven feet high. The witnesses are not in accord on the measurements. The wall of the shanty nearest the drop was strongly built. Plaintiff worked at a point west of the shanty, which witnesses say was from ten feet to over thirty feet from it. It seems to be conceded that while at this place plaintiff was in danger from the flying pieces of iron, but it is said that it was intended that plaintiff and other employees when warned that the metal ball was about to drop should either enter the shanty or step behind it to avoid being struck. There is testimony that the employees were so instructed, although this is denied. ✓

Assuming as a fact that which is controverted, that the shanty was provided for the protection of employees in the yard, can it be said that the presence of a place of refuge to which employees might flee during the operation of the dangerous agency is a compliance with the statute? We think not. Whatever may be said as to the sufficiency of the shanty in sheltering the particular man who released the metal ball, the fact that it might also be a place of refuge for other employees doing work not connected with the drop does not meet the demand of the statute. It might be argued with equal consistency that inside the brick foundry building on the west side of the yard was a place of safety for such employees, and of probably greater safety than afforded by the shanty, but it cannot be claimed seriously that accessibility of the foundry building as a refuge satisfied the requirements of the law. The mandate of the statute is

that "all dangerous places * * * near to which any employe is obliged to pass, or to be employed, shall * be properly * guarded." We hold that this contemplates the protection of employes while they are working in their usual and customary places of work and passing to and from such places, by some protecting screen or device at the source of danger.

Was it shown to be "practicable" to guard the drop, giving to the word "guard" the meaning we have indicated? We are of the opinion that it was. The piece of iron which struck plaintiff flew over the top of the shanty. One "practicable" method which this might have suggested to the jury was to make higher the wall of the shanty next to the drop. If this wall is seven feet high, and a metal ball falls on a "pile of scrap" which seems to be composed largely of car wheels, a flying piece of iron need not go very high to clear this wall, especially if it is six or ten feet away. No reason appears why this wall could not be made ten or more feet higher than it was, or why the shanty should not be placed closer to the drop, which would lessen the likelihood of flying pieces of iron going over it. But whatever weight these suggestions may have, there was testimony both for and against the practicability of guarding the drop, and we do not feel justified in disturbing the conclusion of the jury on this point.

We find no reversible error in the instructions given to the jury or in the rulings on evidence. Even if it should be conceded, which is not, that the modification by the court of instructions Nos. 5 and 6 presented by the defendant tended to mislead the jury, yet the instructions as tendered did not state the law correctly, in that they told the jury in substance that defendant was not guilty if a place of refuge for employes was accessible. Defendant

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cannot be heard to complain of a doubtful modification by the court of its improper instructions. Beaatar Cereal Mill Co. v. Gogerty, 185 Ill. 197.

We see no convincing reason to reverse the judgment and therefore it is affirmed.

AFFIRMED.

222 - 21200

ILLINOIS IMPROVEMENT AND BALLAST
COMPANY,
Plaintiff in Error,
vs.
INGER C. HEINSEN, Executrix,
etc.,
Defendant in Error.

Error to
Circuit Court,
Cook County.

193 I.A. 82

PER CURIAM. The bill of exceptions in this case having heretofore been stricken from the transcript of the record, and it appearing that no errors have been assigned by the plaintiff in error upon the common law record of said cause, there is therefore nothing before this court for review, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

ILLINOIS IMPROVEMENT AND RAILROAD
COMPANY,

Plaintiff in Error,

vs.

JAMES C. HEWITT, Respondent.

Defendant in Error.

Error to

Circuit Court,

St. Louis, Mo.

1931.A.32

THE COURT. The bill of exceptions in this case
having been taken from the transcript of the
record, and it appearing that no errors have been assigned
by the plaintiff in error, and the common law record of said
court, there is therefore nothing before this court for re-
view, and the judgment of the Circuit Court is affirmed.
AFFIRMED.

378 - 19412

HENRY D. LAUGHLIN,
Appellee,

vs.

CHARLES H. NORTON and
HENRY P. NORTON,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

193 I.A. 83

MR. PRESIDING JUSTICE SMITH
DELIVERED THE OPINION OF THE COURT.

This cause was considered by this Court and an opinion was filed June 9, 1914. *(See 187 Ill. App. 257)* The judgment entered here was reversed by the Supreme Court because of an insufficient finding of facts. This Court has carefully reconsidered the cause and is unable to reach a different conclusion from that expressed in its former opinion, and therefore we restate our views in substantially the same language.

Appellee recovered a judgment in the Municipal Court of Chicago against appellants for \$1891.20 and costs. This appeal is prosecuted to reverse it.

The case was tried before the court without a jury. Plaintiff filed the common counts and a bill of particulars in which he claimed that he had loaned the defendants on three separate occasions sums of money aggregating in all \$4017.75. The defendants, appellants here, filed a set-off claiming money due from the plaintiff to defendants as follows: \$2046.82 due to the defendants from the plaintiff upon a certain land contract between the parties, dated May 6, 1905, and \$1251.35 due upon another land contract between the parties, dated October 31, 1905, which sums, with interest, amounted to \$4467.36, and giving the plaintiff credit for \$1277.08, for cash paid them May 21, 1907, on account of

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contracts, with interest at five per cent., making \$1277.08, leaving a balance due the defendants of \$3210.26. The plaintiff filed an affidavit of merits to the set-off, denying that defendants performed under the contract of October 31, 1905, and alleging that he did not waive any of the provisions of the contract and was entitled to a credit of \$1891.95, as payment upon the contract of May 6, 1905.

The controversy grows out of several different land contracts which it will be necessary to state in substance.

Prior to any negotiations with plaintiff Laughlin, the defendants had acquired certain rights in two contracts for the sale of timber land in Wisconsin. The first of these contracts is known as "contract 530," whereby the North Wisconsin Lumber Company agreed to sell certain described land to one Savage, who assigned his right to defendants. The second contract, known as "contract 527," was between the same original parties and was acquired by appellants in the same manner as contract 530, and concerned different lands.

On January 18, 1905, defendants and plaintiff entered into an agreement respecting said contract 530. By the terms of this agreement defendants and the Kamekagon Land & Lumber Company assigned their rights under said contract 530 to plaintiff as security for \$1891.95, stated therein to have been advanced to defendants by plaintiff to pay some instalments due thereon January 15, 1905. In this contract appears what is referred to in the testimony as the option given plaintiff to purchase the land described in the contract, which is material here and is as follows:

...and, this interest in the two views, which is the
 basis of the two theories of the world, the
 first is the theory of the world as a whole, and
 the second is the theory of the world as a part.
 The first theory is the theory of the world as a whole,
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 The first theory is the theory of the world as a whole,
 and the second is the theory of the world as a part.
 The first theory is the theory of the world as a whole,
 and the second is the theory of the world as a part.

"But coupled with this assignment and pledge of said contract is the option given to said Laughlin to pay off all future payments on the lands described and thereby become entitled to a deed for the lands direct from said North Wisconsin Lumber Company, provided he exercises this option within eight months from this date and at the same time he does so pays the Kamekagon Land & Lumber Company the sum of (\$2046.82) Two Thousand Forty-six Dollars and eighty-two cents, and at the same time executes and delivers to the parties of the first part a release in full for the moneys by him advanced pursuant to this stipulation."

At the time of the execution of the January 18, 1905, contract, plaintiff Laughlin delivered to defendant C. H. Norton his check for \$1891.95, which he claims was a loan, and for which he recovered judgment below. May 6, 1905, the parties entered into a contract bearing that date, whereby the rights of the defendants, under said contract 530, were assigned to plaintiff. The two contracts of January and May, 1905, described the same land, constituting 1023 and a fraction acres.

Subsequently, on October 31, 1905, the same parties entered into another land contract, by the terms of which defendants agreed with the plaintiff to assign to him the entire interest of the original purchaser in certain described lands which the defendants held by virtue of an assignment of a contract between the North Wisconsin Lumber Company and one John Savage, above referred to as "contract No. 527," for the sum of \$1251.35, and the assumption by the plaintiff of five deferred payments to become due under the contract. This contract provided that the defendants should confirm by deed such assignment, in manner and form to the satisfaction of the plaintiff, and from all the parties in interest, including shareholders of the Kamekagon Land & Lumber Company, and also obtain the consent of the North Wisconsin Lumber Company to the assignment or transfer to the plaintiff of said contract No. 527.

It is claimed by the plaintiff and he so testified that in September, 1906, prior to signing the contract of October 31st, the defendant, C. H. Norton, told him there was a payment coming due on the contract No. 527, concerning which defendants and plaintiff were trying to make an agreement, and defendant, C. H. Norton, asked plaintiff to advance the amount due, which he would treat as a loan in case the contract was not consummated, or upon account of the contract if it was consummated later. The amount due on the contract was \$1125.80. Plaintiff further testified and claimed that on October 30, 1906, he executed and delivered a check to the order of William R. Moss, attorney for the defendants, for \$1125.80, and that later, in May, 1907, C. H. Norton again stated to the plaintiff that they were still in trouble growing out of the lumber venture in Wisconsin; that he, Norton, wanted to make a dividend among the others interested in the land, and asked plaintiff to let him have \$1000 as a loan if the deal then pending did not go through; that thereupon plaintiff delivered to defendant his check for \$1000, payable to the order of William R. Moss, dated May 21, 1907. Plaintiff's testimony as to this conversation was denied by Norton. Plaintiff also testified that he never took possession of the premises described in the October 31, 1906, contract, nor did he exercise any rights therein, and that he never received the consent of the North Wisconsin Lumber Company to the assignment to him of contract No. 527, as provided by the terms of the October 31st contract.

It was claimed by the defendants that Laughlin, the plaintiff, waived the procurement by the defendants of the consent of the North Wisconsin Lumber Company to this assignment, and agreed to attend to that matter personally, and that the interest of all the parties in the lands des-

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cribed in the contract of October 31, 1905, including the shareholders of the Kamekagon Land & Lumber Company, was conveyed to the plaintiff.

It was further contended on the part of the defendants that Laughlin elected to exercise his option contained in the agreement of January 18, 1905, out of which the contract of May 6, 1905, grew.

The trial court in reaching its judgment found that the \$1891.95 mentioned in the contract of January 18, 1905, was a loan, and that the burden of proving payment thereof was on the defendants, and that they had failed to sustain that burden. The court held that the contract of October 31, 1905, was not fulfilled by the defendants; that the plaintiff Laughlin had advanced \$1125.81 to apply on the contract of October 31, 1905, and also the \$1000 loan of May 21, 1907, to apply on that contract if it was ever completed; that the plaintiff was entitled to interest on the sum of \$1891.95, which amounted to \$717, making a total of \$4735.12. As against this amount, the court found that defendants were entitled to a credit of \$2046.82, named in the contract of May 6, 1905, with interest, making a total of \$2839.92, and leaving a balance of \$1895.20 due plaintiff.

Upon a review of the evidence, we are of the opinion that the loan of \$1891.95 mentioned in the contract of assignment of January 18, 1905, was applied on the Savage contract known in the record as Contract No. 530, in the exercise of the option contained in the assignment contract of January 18, 1905, by the plaintiff Laughlin, prior to the contract of May 6, 1905, and that by agreement between the plaintiff Laughlin and defendants the receipt of the payment of the check for \$1891.95 to the North Wisconsin Lumber

Company, together with \$130 advanced by defendants, and endorsed on the contract by the Lumber Company, operated as a release and discharge of the loan. By the terms of the contract of January 18, 1905, if Laughlin exercised his option to buy the land he was to make the future payments due on the land, pay the sum of \$2046.82 and release in full the moneys by him advanced, namely, the \$1891.95. The evidence in the record shows, we think, that appellants raised the amount of money necessary and used Laughlin's check of \$1891.95, and, with the money and check, made the payment due in January under the terms of the contract, upon Laughlin's request and upon his agreement to take an assignment of the contract, or, in other words, to exercise his option. This was done in the early days of May prior to the execution of the May 6th contract. The testimony of Moss and C. H. Norton, together with the writings, show that this was done in partial execution of the contract of January 18, 1905. The parol testimony offered and received on this question did not tend to vary or change the contract of May 6th. It showed that was said and done by the parties under and in execution of the contract of January 18, 1905, and was competent for that purpose under the issues in the case. The manifest preponderance of the evidence on this question is with appellants.

On the issue as to whether the contract of October 31, 1905, was substantially performed on the part of defendants, we think the finding of the court was against the clear weight of the evidence. It clearly appears without controversy in the evidence who were the stockholders of the Namakagon Land & Lumber Company, and that they owned all of the stock. All of the stockholders (except Olin Kenyon) and

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It is a very common mistake to suppose that the only way to get rid of a bad habit is to try to suppress it. This is a very dangerous and often a very foolish policy. The only way to get rid of a bad habit is to find out what the habit is, and then to find out what the cause of the habit is. When you find out the cause of the habit, you can then find out how to get rid of the habit. This is the only way to get rid of a bad habit.

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the company itself joined in a quit claim deed, dated October 31, 1905, to the plaintiff Laughlin. This deed was delivered to Laughlin, and, at the same time, a deed from Kenyon was delivered to him. The evidence does not show that defendants obtained or delivered to the plaintiff the consent of the North Wisconsin Lumber Company to the assignment of contract No. 527 to Laughlin, as provided by the terms of the contract of October 31, 1905. The procurement of this consent, however, was waived, as shown, by the clear and direct testimony of appellants and of Moss. Against this testimony is that of plaintiff, denying that he waived the procurement of the consent by defendants and agreed to obtain it himself. We think the clear weight of the evidence on this point must be held to be with defendants. We regard the law as settled in this State that covenants contained in an executory sealed contract may be waived by parol by the party for whose benefit they were inserted, provided no new element or terms are added; and the party to a contract so waiving one of its terms or covenants will be estopped to insist that such covenant was not performed by the other. (Becker v. Becker, 250 Ill. 117; Moses v. Loomis, 155 Id. 392; Werrell v. Forsyth, 141 Id. 22.)

The plaintiff Laughlin, according to the evidence stated that he would attend to procuring the consent of the North Wisconsin Lumber Company himself. By this affirmative act or statement on his part, he induced the defendants to believe that a strict performance of the covenant would not be required or would be waived. Relying upon this, the defendants did not obtain the consent of the Lumber Company as they would have done. It would be a fraud upon the defendants to permit the plaintiff to thus put them off their

guard and lead them into omitting to perform, and then, when it is too late for them to perform, insist that they have failed to keep their covenant.

There is some question made in the evidence as to whether any deed from Kenyon was ever delivered to the plaintiff. This arises as an inference from plaintiff's testimony that he had delivered to Mr. Jones, of counsel for plaintiff, all the deeds which he received from the defendants or William R. Moss, and it was agreed on the trial that if Jones took the witness stand he would testify that he had produced in court all deeds turned over by the plaintiff to his counsel. It appeared that no deed from Kenyon was among the papers. The testimony of Mr. Moss, is direct and positive that among the papers he delivered to the plaintiff was a quit-claim deed of Kenyon to the property described in the October contract. If, however, a quit-claim deed from Kenyon was not obtained, it would not have been such a failure on the part of defendants to perform their contract as would have entitled the plaintiff to abandon or rescind the agreement and recover payments made thereon. The original contract, concerning which the October contract was made, was assigned by Savage, the original purchaser, on May 12, 1904, to C. H. and H. P. Morton, and on October 23, 1905, the Mortons assigned and transferred all their rights therein to the plaintiff. Plaintiff thereby obtained all that it was possible for him to obtain. The shareholders of the Namakagon Land & Lumber Company do not appear to have had any rights in the contract, and deeds from them were useless and of no legal effect.

In order to justify Laughlin in rescinding the contract and recovering the money paid, defendants must have

October 19, 1960. The following information was received from the Bureau of the Census, Washington, D. C.:

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
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failed in a substantial manner to observe their part of the contract. The object of the contract must have been defeated or rendered unattainable by defendants' misconduct or default. (Weintz v. Hafner, 78 Ill. 27; Leopold v. Salkey, 89 id. 412; Pittenger v. Pittenger, 208 id. 562.) The evidence bearing on this question considered, we are of the opinion that defendants substantially performed the October 31, 1905, contract. Laughlin, therefore, has no right to recover back the \$1125.80, the amount of the check payable to William H. Neas, dated October 30, 1905; and it follows further that the defendants are entitled to recover from Laughlin on their set-off the sum of \$2046.82, provided by the contract of May 6, 1905, to be paid to defendants by plaintiff with interest. Defendants are also entitled to recover the sum of \$1291.35 agreed to be paid by plaintiff to defendants by the contract of October 31, 1905, with interest from April 20, 1906. Appellants concede in their statement of set-off and in their briefs that appellee is entitled to a credit against these items of \$1000, cash paid May 21, 1907, with interest thereon.

The judgment is therefore reversed and judgment is entered here on a finding in favor of appellants, defendants below, and against appellee, plaintiff below, for \$3487.58.

REVERSED AND JUDGMENT HERE.

(OVER.)

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HENRY D. LAUGHLIN,
Appellee.

vs.

CHARLES H. MORTON and
HENRY F. MORTON,
Appellants.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

FINDING OF FACTS BY THE COURT.

✓ The Court finds that on January 16, 1905, appellee, Laughlin, loaned to appellants, Charles H. Morton and Henry F. Morton, the sum of \$1891.95, mentioned in a certain contract of assignment of that date between the Semekegon Land & Lumber Company and said Mortons as parties of the first part and appellee Laughlin as party of the second part, and that said money, together with other moneys of appellants, was applied on a certain contract for the purchase of lands by John H. Savage from the North Wisconsin Lumber Company, known and referred to in the record as Contract No. 536; that prior to the making of the contract dated May 6, 1905, between appellants and appellee, hereinafter mentioned, said Laughlin elected to avail himself of and to exercise the option given him in the assignment contract of January 16, 1905, and to purchase the contract and the lands described therein; and in consideration thereof and other good and valuable considerations, appellee Laughlin agreed to release and discharge the said loan of \$1891.95.

And the Court further finds that by a contract in writing entered into on May 6, 1905, the appellee, Henry D. Laughlin, agreed to pay appellants \$2046.82 (being the

amount of the cash payment which the appellants had made on contract No. 530 when they acquired it) on or before two years from and after May 6, 1905, with interest thereon at the rate of 5 per cent per annum to date of payment; that appellants kept and performed their agreements and covenants in said contract of May 6, 1905, but said appellee Laughlin failed to make such payment of \$2046.82, or any part thereof; that said appellee Laughlin, by a contract entered into between himself and appellants, dated October 31, 1905, agreed to pay appellants the farther sum of \$1251.35 upon the performance by appellants of said last mentioned contract, and also to assume and pay five deferred payments under a certain contract known as No. 527, dated November 6, 1905, between the North Wisconsin Lumber Company and John H. Savage, mentioned and referred to in the contract of October 31, 1905; that the first of said deferred payments fell due November 6, 1905, and amounted to \$1125.80, and that said appellee delivered to appellants his check, dated October 30, 1905, for \$1125.80, in part performance of said agreement dated October 31, 1905, and that the amount so advanced was paid to the North Wisconsin Lumber Company in satisfaction of the said payment due November 6, 1905, on said contract No. 527, and appellee was notified of such payment; that appellants performed and carried out said contract of October 31, 1905, except in the matter of the procurement of the consent of the North Wisconsin Lumber Company to the assignment to said Laughlin, provided for therein; that the procurement of the consent of said Lumber Company by appellants was waived by said Laughlin; that the total amount of said sums of \$2046.82 and \$1251.35, so agreed to be paid by said appellee Laughlin to said appellants, with 5 per cent interest thereon to date,

amounts to \$4885.58; that said appellee Laughlin advanced to appellants the sum of \$1000 on May 21, 1907, as a loan, and that said loan, with interest at 5 per cent thereon to date, amounts to \$1398, which amount appellants concede in their statement of set-off and in their briefs filed herein should be credited to appellee Laughlin; and the Court finds that there is a balance due appellants from appellee Laughlin of \$3487.58 after allowing all just credits. ✓

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 91

R H Denied Apr 8/15

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day
of October, A. D. 1914, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Action brought by appellant against the appellee for damages for the death of the plaintiff's testate caused by the explosion of gas which escaped from a gas lamp or gas lighting and heating plant installed by the defendant. From a judgment for \$6000 in favor of the plaintiff the defendant appeals.

No. 5902

Jennie Mahlstedt, Executrix of the
Last Will and Testament of Daniel
Mahlstedt, Deceased,

Appellee.

vs.

Ideal Lighting Company,

Appellant.

Lighting and heating
plant installed by
the defendant. From
a judgment for \$6000
in favor of the plaintiff
the defendant appeals.
Appeal from Rock Island.

~~Opinion by~~ CARNES, J.

^{The} Appellant, Ideal Lighting Company, was a corporation engaged in the manufacture for sale, among other things, of gasoline lighting and heating systems. Daniel Mahlstedt, husband of appellee, was a farmer. Whiteside Brothers were merchants, and H. Busier was a salesman for appellant.

^{The} On May 18, 1911, appellant, at its factory, delivered to Mahlstedt a lighting and heating outfit for installation in his farm house, pursuant to an arrangement that had been made with him by Busier, and ^{then} sent Whiteside Brothers an invoice of the items "Sold to Dan Mahlstedt and charged to Whiteside Brothers", with a letter saying, "We trust you will lose no time in installing the outfit for our customer". The arrangement was that Whiteside Brothers should furnish some necessary material for the installation and attend to the work, and that appellant would send an expert to help on the last day of the work and to start the plant. The work was started by one of the Whiteside Brothers on a Friday, and among other things done that day the carburetter and a gasoline tank were placed in a hole dug in the yard 20

No. 5902

Jennie Wahlstedt, Executrix of the
 Last Will and Testament of Daniel
 Wahlstedt, deceased,
 Appellee,
 vs.
 Ideal Lighting Company,
 Appellant.

Appeal from Cook Island.

SYNOPSIS OF FACTS

Appellant, Ideal Lighting Company, was a corporation engaged in the manufacture of and sale of electric lighting and heating systems. Daniel Wahlstedt, husband of appellee, was a farmer. The brothers were merchants, and H. Bader was a salesman for appellant. On May 18, 1911, appellant, at its factory, delivered to Wahlstedt a lighting and heating outfit for installation in his farm house, pursuant to an agreement that had been made with him by Bader, and Daniel Wahlstedt's brothers on invoice of the items "Sold to Dan Wahlstedt and arranged to install the same", with a letter saying, "We trust you will have no time in installing the outfit for our customer". The agreement was that Wahlstedt's brothers should furnish some necessary material for the installation and attend to the work, and that appellant would send an expert to help on the last day of the work and to start the plant. The work was started by one of the Wahlstedt brothers on Friday, and some other things done that day, the carpenter and a gasoline tank were placed in a hole dug in the yard 20

or 30 feet from the building, whereif uncovered, they would be exposed to the direct rays of the sun. Busier came Saturday morning, ^{and he} and stayed all day, active in the work. The system was started in the evening on Buster's suggestion, and Mrs. Mahlstedt used it in getting supper. There was something more to be done, and Busier and Whiteside left with the intention that Whiteside should return Monday and complete the work. The tank and carburetter were left uncovered, ^{although they} and should have been covered before using the plant in daylight to prevent heating from the sun's rays. The next day, Sunday, was a bright, hot day; the family used the plant and towards night were unable to light a burner, and Mahlstedt going into the basement of his house to investigate and lighting a match, was fatally injured by an explosion of gas.

~~Appellee as his executor, brought this action to recover for his death, and filed a declaration, in Case; charging among other things that appellant agreed to furnish and install, under the supervision of one of its experts, a lighting and heating sustem for Mahlstedt, and did install one, (describing it), and informed Mahlstedt that it was in condition to be operated; that an air pipe was not properly located and equipped; that the carburetter and pipe were improperly placed and left uncovered; and that no expert was furnished to inspect the system and put it in operation; that Busier acted for appellant in that capacity, and informed Mahlstedt that the system was properly installed and in condition to use; but that Busier was not an expert, and Mahlstedt having no knowledge of that fact, or of the defects in the system, attempted to use it, resulting in the~~

or 30 feet from the building, where it was recovered and found to be exploded to the direct rays of the sun. Master case
Saturday morning and stated all day active in the work.
The system was started in the evening on Master's suggestion and Mrs. White used it in getting supper. There
was something more to be done and Master and White left
with the intention that White should return to the plant and
complete the work. The tank and carboximeter were left un-
tended and should have been covered before raising the plant in
daylight to prevent heating from the sun's rays. The
next day, Sunday, was a bright, hot day; the rays beat the
plant and toward night were unable to light a burner, and
White went into the house to investigate
and lighting a match, was fatally injured by an explosion
of gas.
Apparatus as an executor, brought this action to
recovery for his death; and filed a declaration, in case;
emerging among other things that defendant agreed to
furnish and install, under the supervision of one of its
experts, a lighting and heating system for defendant,
and also install one (describing it), and also install
that it was in condition to be used; and that the pipe was
not properly located in the room; that the carboximeter and
pipe were improperly placed and left uncovered; and that
no expert was furnished to inspect the system and put it in
operation; that Master acted on a belief in his capacity,
and informed White that the system was properly installed
and in condition to use; but that Master was not in a position
and White had no knowledge of that fact, or of the
defects in the system, attempted to use it, resulting in the

~~explosion and consequent injury and death. A plea of the general issue was filed, and a jury trial resulted in a verdict and judgment for \$6333, from which this appeal.~~

Whiteside Brothers had ^{theretofore} ~~theretofore~~ purchased similar lighting systems for their customers, and had some, but not much, experience in installing them. This ^{sale} ~~transaction~~ was brought about by Busier applying to Whiteside Brothers to accompany him in a canvas of the country, ^{and} ~~for sales~~, which one of them was ^{with Busier} ~~doing~~, at the time of the sale in question. When Mahlstedt removed the machinery from appellant's factory, he ~~apparently~~ ^{from} did not know whether he was buying it ^{from} ~~of~~ appellant or Whiteside Brothers, and ^{when} ~~he~~ asked whom he should pay, ^{he} ~~and~~ was told by one of appellant's officers that it made no difference, he could pay either as he pleased. ^{an} ~~The~~ invoice ^{was} ~~sent~~ to Whiteside Brothers was subject to a commission discount. As ~~between~~ appellant and Whiteside Brothers it was treated as the sale of the latter, and the ~~purpose of~~ ^{the} ~~appellant in~~ furnishing its agent Busier to ~~solicit trade in that territory was no doubt to create a demand for its goods to be handled by Whiteside Brothers in the ordinary course of their business as retail merchant.~~ It is contended by appellant that the transaction amounts only to a sale and installation of the plant by Whiteside Brothers, and ^{what} ~~therefore it~~ ^{is not} ~~cannot~~ be liable for ~~any~~ defect in installation; and that the evidence shows ^{it} ~~no~~ defect in the machine, ~~that would make it liable as a manufacturer selling goods to a retailer, for an injury to one purchaser from the merchant.~~ We are of the opinion that the evidence ~~of the whole transaction beginning with the conversation~~

of the whole transaction beginning with the conversation of the merchant. We are of the opinion that the evidence relating to a retailer, for an injury to one purchaser from the machine, that would make it liable as a manufacturer installation; and that the evidence shows no defect in Brothers, and therefore it cannot be liable for any defect in only to a sale and installation of the plant by Whiteside Brothers, and therefore it cannot be liable for any defect in the ordinary course of their business as retail merchants. It is contended by appellant that the transaction amounts to a sale for its use to be handled by Whiteside Brothers in the territory in that territory was no doubt to create and the purpose of appellant in furnishing its agent Butler Whiteside Brothers it was treated as the sale of the latter, to a commission discount. As between appellant and Whiteside Brothers, the invoice sent to Whiteside Brothers was subject to the same no difference, he could pay either as he whom he should pay, and was told by one of appellant's officers that it made no difference. Whiteside Brothers did not know whether he was buying it of appellant or Whiteside Brothers, and he asked appellant's factory, he apparently did not know whether he was brought about by Butler applying to Whiteside Brothers much, experience in installing them. This transaction in lighting systems for their customers and had some, but not Whiteside Brothers had theretofore purchased similar material and made it for 6000, from which it was a general issue was filed, and a jury trial resulted in a verdict and consequent injury and death. A plea of the

~~between Busier and Mahlstedt in the country, and ending withh~~
~~the installation of the system, and including what was said~~
~~at the factory at the time Mahlstedt got the property there,~~
~~warranted the jury in finding that as between Mahlstedt and~~
~~appellant, it was the appellant and not Whiteside Brothers that~~
~~sold and undertook to install the system; therefore appellant~~
~~is to be considered in that capacity, and not merely as a~~
~~manufacturer, in its relation to Mahlstedt and consequent~~
~~duties and liabilities.~~

~~Whatever may be the fact as to the placing of the~~
~~pipes properly or improperly, ^{It was} there ^{but} is little question, that~~
~~the cause of the accident was the effect of the sun's heat on~~
~~the gasoline in the carburetter during the day, Sunday, and~~
~~that had it been covered before it was so heated, the accident~~
~~would not have happened.~~ Whiteside testified that when
he left Saturday night he told Mahlstedt that it must be
covered before using to prevent heating the gasoline, and
that Busier, who was taking part in the conversation, said it
would not make much difference. If this is true Mahlstedt ~~wa~~
~~was not guilty of such contributory negligence in not covering~~
~~the tank as would defeat a recovery.~~ It may be that the
~~action of heat on gasoline is a matter of common knowledge;~~
~~but that the result of heating this gasoline located in the~~
~~yard might be to let gas escape into the cellar, would not~~
~~be known to a man not familiar with the working of the~~
~~system.~~ There was sufficient evidence to support the
conclusion that Busier was acting as the agent of appellant
in control of the installation, and that he assumed to
understand the situation, and that Mahlstedt might reasonably a

between the two countries, and ending with the installation of the system, and including the time taken at the factory at the time of the installation of the system, here, warranted the jury in finding that the appellant was not liable for the accident; therefore appellant sold and undertook to install the system; therefore appellant is to be considered in that capacity, and not merely as a mere contractor, in its relation to the installation of the system and installation.

Whatever may be the first or to the finding of the jury as to the propriety of the installation, there is little question that the cause of the accident was the effect of the gas, and not the gasline in the car, as the jury found, and that had it been covered before it was so heated, the accident would not have happened. The witness testified that when he left Saturday night he told the appellant that it must be covered before using to prevent heating the gasline, and that Butler, who was taking part in the conversation, said it would not make much difference. It is this that the appellant was not guilty of such extraordinary negligence in not covering the tank as would be a recovery. It is to be noted that the action of heat on gasline is a matter of common knowledge; but that the result of heating the gasline located in the yard right up to let gas escape into the cellar, would not be known to a man not familiar with the working of the system. There is sufficient evidence to support the conclusion that Butler was acting as the agent of appellant in control of the installation, and that he assumed to understand the situation, and that appellant should reasonably

act under his advice and direction. There ^{was} is evidence that Busier said he had never before unstalled a plant, but it does not appear that Mahlstedt heard him say it or knew that fact, and it is uncontradicted that the purchase was made on the statement that appellant would provide an expert for the work, and while it was no doubt understood by Mahlstedt that Whiteside Brothers were to do the mechanical work, and one of them did a part of it, he had no reason to suppose he was the expert contemplated, and might reasonably assume Busier was, and be guided by what he said.

There was a suit pending against Whiteside Brothers for the same injury, and their interest in the event of this suit and natural desire that the liability should rest on appellant rather than themselves, is urged as a reason for disregarding their testimony, --- Busier died before the trial, and the agent of appellant who delivered the apparatus to Mahlstedt at the factory was disqualified as a witness because of his interest; all of which put appellant in a hard position as to proof of facts, which difficulty his counsel urge here with much tact and earnestness; and we presume it was also presented to the jury and by them considered. The Court at the request of appellant gave to the jury a number of what is known as cautionary instructions, in which their attention was as fully and clearly directed to those considerations as the law permits.

We cannot disregard the evidence of witnesses qualified by law to testify in a case merely because they had a motive to distort the facts and the opportunity to do so without being contradicted, and we see nothing in the record from which we

~~can say the jury were not warranted in crediting such evidence in this case.~~

Appellant offered the widow of Busier as a witness, and she was permitted to testify that she accompanied her husband to the Mahlstedt farm on the Saturday in question, reaching there some time before noon and remaining until after supper. She was then asked to state what her husband said to Mahlstedt, and an objection to the question was sustained, when counsel stated that he proposed to show by the witness that on the arrival of Mr. Busier at the Mahlstedt farm on May 20, 1911, he informed Mr. Whiteside and Mr. Mahlstedt that he had come there out of curiosity to see the installation of that machine and plant; that he had sold numerous plants and never yet had seen one installed. And further to show by the witness that before Busier left the Mahlstedt farm he told him, Mahlstedt, not to use that plant until the plant and carburetter and pipes had been covered with earth. The court held the witness incompetent to testify to those conversations. She was not qualified to so testify by our Statute. It is provided in Section 5 of our Act on Evidence and Depositions "That nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife." She was not competent at the common law to testify to admissions or conversations made by her husband to her or to third persons; *Baker v. Baker*, 239 Ill. 82; *Donnan v. Doonan*, 236 Ill/ 341; *Abrahams v.*

can say the jury was not misled in evaluating such
 evidence in this case.
 Appellant offered the view of Butler as a witness, and
 the court permitted to testify that she accompanied her husband
 to the landlaid farm on the Saturday in question, reaching
 there some time before noon and remaining until after
 supper. The court then asked to state what her husband said
 to Appellant, and no objection to the question was sustained,
 when counsel stated that he proposed to show by the witness
 that on the arrival of Mr. Butler at the landlaid farm on
 May 20, 1911, he informed Mr. Higgins and Mr. Landlaid
 that he had come there out of curiosity to see the install-
 ation of that machine in that; that he had told numerous
 friends and never yet had seen one installed. And further
 to show by the witness that before Butler left the landlaid
 farm he told him, Landlaid, not to use that plant until the
 plant and compressor and pipes had been covered with earth.
 The court held the witness incompetent to testify to those
 conversations. The court was not qualified to so testify by
 its opinion. It is provided in Section 5 of our act on
 Evidence and Testimony "That nothing in this section
 contained shall be construed to authorize or permit any such
 husband or wife to testify to any admissions or conversations
 of the other, whether made by him to her or by her to him, or
 by either to third persons, except in suits or causes between
 such husband and wife." The court was not competent at the
 court to testify to admissions or conversations made
 by her husband to her or to third persons; Baker v. Baker,
 229 Ill. 82; Donnan v. Donnan, 226 Ill. 341; Abraham v.

Woolley, 243 Ill/ 365. The exclusion rests on the grounds of publicpolicy independent of the question of interest of the husband in the suit.

The widow of Mahlstedt testified in the case and was permitted, over the objection of appellant, to testify to various facts, but not to conversations of her husband or to any material ~~misrepresentation~~ controverted fact that she could be presumed to have learned by means of the marriage relation that would bring her within the rule announced in Schreffler v. Chase, 245 Ill/ 395, cited by counsel for appellant. We find no other question arising on the admission or rejection of evidence that seems to us ~~to~~ of sufficient importance to require discussion.

It is argued that Mahlstedt should have known there was escaping gas in the cellar and therefore was guilty of contributory negligence in lighting a match. ~~That~~ was a question for the jury. The Court would not have been warranted in directing a verdict on that ground. We are not inclined to disturb the verdict of the jury on that question or to hold that the Court erred in adopting their conclusion that he was in the exercise of ordinary care in so doing.

Appellant argues earnestly that the Court erred in not, of his own motion, given the jury instructions as to questions of law involved. The field is not open for consideration of the necessity and propriety of such a rule or of the construction of our Statute relating to instructions. It has long been settled law in this State that the Court is under no such duty. It is said in The People v. Lucas, 244 Ill.

7
The evidence of the witness of the husband in the suit.

The widow of defendant testified in the case and was permitted, over the objection of appellant, to testify to various facts, but not to conversations of her husband or to any material ~~xxxxxxxxxx~~ controverted fact that she could be presumed to have learned by means of the marriage relation that would bring her within the rule announced in *Schreffler v. Chase*, 245 Ill. 335, cited by counsel for appellant. The fact of other relation existing as to admission or rejection of evidence that seems to us to be of sufficient importance to require discussion.

It is argued that defendant should have known there was something in the cellar and therefore was guilty of contributory negligence in lighting a match. That was a question for the jury. The Court would not have been warranted in directing a verdict on that ground. We are not inclined to disturb the verdict of the jury on that question or to hold that the Court was in adopting their conclusion that there was in the exercise of ordinary care in so doing.

Appellant argues that the Court erred in not, of his own motion, giving the jury instructions as to questions of law involved. The field is not open for consideration of the necessity and propriety of such a rule or of the construction of our Statute relating to instructions. It has long been settled law in this State that the Court is under no such duty. It is said in *The People v. Lucas*, 244 Ill.

603, on page 614 "This Court has often held that it is the duty of the Court to pass on and give or refuse such instructions as are asked by the parties, and that a party cannot complain of the failure of the Court to give an instruction unless it has been prepared and tendered for that purpose"; and the Court adds that the rule is the same in civil and criminal cases. Numerous instructions were given for the defendant covering every question it saw fit to present. The Court refused one instruction asked by defendant and modified another, but in instruction given at its instance, the law attempted to be presented by those instructions was given fairly and fully. No complaint is made of instructions given for plaintiff and no other error argued that seems to us to require discussion.

Finding no error in the record the judgment is affirmed

This case was considered and decided at the October Term, 1913, and the preparations of the opinion has been delayed by the sickness and death of Mr. Presiding Justice Whitney, to whom the case had been assigned to write the opinion.

600, on page 614 "This Court has often held that it is the duty of the Court to pass on and give or refuse such instructions as are asked by the parties, and that a party cannot complain of the failure of the Court to give an instruction unless it has been prepared and tendered for that purpose"; and the Court adds that the rule is the same in civil and criminal cases. Numerous instructions were given for the defendant covering every question it saw fit to present. The Court refused one instruction on asked by defendant and modified another, but in instruction given at its instance, the law attempted to be presented by those instructions was given fairly and fully. No complaint is made of instructions given for plaintiff and no other error argued that seems to us to require discussion.

Finding no error in the record the judgment is affirmed.

This case was considered and decided at the October Term, 1913, and the preparations of the opinion has been delayed by the sickness and death of Mr. Presiding Justice Whitney, to whom the case had been assigned to write the opinion.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this thirteenth
day of October, in the year of our Lord one thousand nine
hundred and fourteen.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

✓ Hon. DORRANCE DIBELL, Justice.

Hon. _____, Justice 193 I.A. 107

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

R H Denied Apr 7/1 ✓

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day
of October, A. D. 1914, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

IN SENATE, JANUARY 1, 1907

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1906
PART I
GENERAL STATEMENT OF THE LANDS OF THE UNITED STATES
AND THE LANDS OF THE SEVERAL STATES

1907

WASHINGTON: GOVERNMENT PRINTING OFFICE
1907

OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
WASHINGTON, D. C.

BY THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1906
PART I
GENERAL STATEMENT OF THE LANDS OF THE UNITED STATES
AND THE LANDS OF THE SEVERAL STATES

No. 5956.

Sabatino Magnani, appellee,)
vs.)
Spring Vallay Coal Company,)
appellant.)

*Advised by appeal from the
to Bureau for appeal
submitted by the plaintiff
while in the mine
the closed out on a
mine. From a
in favor of the plaintiff
for \$1500 the defendant
appears.*

Appeal from Bureau.

Opinion by DIBELL, J.

The Spring Valley Coal Company operated a coal mine on ^{in north of} the long wall plan at Delzell, in Bureau County. Sabatino Magnani worked therein as a coal miner. There was a main west entry therein and another entry turned off therefrom, known as the main south west. Rooms or entries were turned off this main south west. Magnani's room or working place was on the first right entry off the south west. On August 29, 1912, ^{he} he worked there without his "buddy". The mine was to close that day at 1.30 P. M. Shortly after 1 o'clock P. M. the car he had in ^{the} that entry was loaded. He applied to the driver to take the loaded car out, so that he could set in an empty and begin loading it, and was informed that the loaded car would not be taken out till next morning, ^{So as} he could not do any further work till that car was taken out, he there-fore left his entry and started walking in the south west entry towards the shaft; ^{and} ~~more~~ the south west turned off the main west and just inside the south west was a door to control the circulation of the air. ~~to one passing through that door~~ and going towards the face of the coal in the main south west there was a sharp decline, ^{he was struck by} ~~trip~~ ^{trip} of a driver and one mule drawing two empty cars, came through the door and started down the decline. There was no brake and the driver had no sprags and could do nothing to lessen the

speed of the car, except with his feet, and he could not by his foot impede the motion of the car to any great extent. Therefore, in going down the incline the head car ran against the mule and the mule ran rapidly to keep out of the way of the car. After Magnani started towards the shaft in the main south west, his light, ~~carried on his cap,~~ went out. he saw the car coming, but because his light was out, the driver could not and did not see him till just before the trip reached him. When Magnani saw the car coming and knew that his light was out, he started running from the car and going from side to side of the entry, evidently seeking for ^a the places of refuge provided by Section 15 (b) of the Act of July 1, 1911, concerning Mines and Miners, ^{which} he was unable to find a place of refuge, and the entry was so narrow that the car could not pass him, and when the driver saw him just in front of the mule it was too late for the driver to do anything to stop. While running, Magnani struck his head against a low place in the roof and was knocked down and run over by one or both of the cars. ^{and} ~~each empty car~~ weighed 1500 or 1600 pounds. No bones were broken, but he was seriously injured in various ways, not necessary to be described. He was in a hospital for a time and was treated at his home by a physician for a long time, and was unable to work for one year, and at the time of the trial, in January, 1914, he was still suffering from the injury. He brought this suit against his employer to recover damages for said injuries, and filed an original declaration and additional counts and amendments thereto and another additional count. Some of the counts charged a wilful violation of the statute and others common law negligence.

Issues of fact were joined on most of these counts and there was a jury trial. At the close of plaintiff's evidence plaintiff dismissed his suit as to all of the declaration except the first additional count. Certain evidence was excluded by ^{agreement} argument. There was a verdict for plaintiff, assessing his damages at \$1,500. Motions for a new trial and an arrest of judgment were denied. Plaintiff had judgment on the verdict and defendant appeals therefrom.

The first additional count alleged that the mine examiner wilfully failed to comply with various requirements of the statute, and among these charged the wilful failure to inspect all places where men were required to pass in the performance of their duties and to observe whether there was any dangerous roof or dangerous obstructions in roadways ~~and in the roadway aforesaid and wilful failure to place a~~ ~~conspicuous mark along said roadway at the dangerous roof and wilful failure to make a record, etc.~~ The proof introduced by plaintiff tended to show that ^{this} roadway had been brushed from the outside in for a certain distance and then at the place where plaintiff struck his head against the roof the brushing had ceased and that there was a sharp drop in the height of the roof and that plaintiff struck his head against that. ~~Witnesses for defendant denied that there was any such sharp change.~~ Nevertheless, the oral evidence and plat introduced by the defendant, showed that 40 feet inside the entry way the roof was 7.3 feet high on the right hand side and 7.2 feet high on the left hand side, while 10 feet further on it was 4.2 feet high on the right and 5.1 feet high on the left, showing a drop in the roof somewhere within that distance of 10 feet of over 3 feet on

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 and in the roadway stores and willful failure to place a
 conspicuous mark along said roadway at the dangerous roof
 and willful failure to make a record, etc. The proof
 introduced by Plaintiff tended to show that this roadway
 had been punched from the outside in for a certain distance
 and then at the place where Plaintiff struck his head against
 the roof the punching had ceased and that there was a sharp
 drop in the height of the roof and that Plaintiff struck
 his head against that. Evidence for defendant tended to show
 that as any such sharp change in the roof, the oral
 evidence and that introduced by the defendant showed that
 40 feet inside the entry the roof was 7.3 feet high on
 the right hand side and 7.2 feet high on the left hand side,
 while 10 feet further on it was 4.2 feet high on the right
 and 5.1 feet high on the left, showing a drop in the roof
 somewhere within that distance of 10 feet of over 3 feet on

one side and over 2 feet on the other. ~~It is contended that taking the evidence of the witnesses for the plaintiff as to the place where plaintiff fell, this place where the roof had such a drop could not have been the place where the plaintiff's head hit the roof. These witnesses did not pretend to have measured the distances from the door, nor to know precisely how far in the entry way it was that he fell.~~ Plaintiff testified that as he ran to get away from the trip, he held his head down low. ~~There is no prima denial in the evidence of the fact testified to at least by two witnesses that he did strike his head against a low place in the roof and thereby fell in front of this trip.~~

There is no statute defining the height which a roof is required to be in such an entry way. It is evident that an entry way can be so low as to be dangerous to those employees who are required to pass back and forth therein between the shaft and the place of work. We think it the spirit of the Mining act that if such an entry way is so low as to be dangerous to employees rightfully travelling therein, then this is a condition which is required to be marked and to be removed. It is clear that defendant had brushed this roof to about the place where plaintiff struck his head and fell and that then defendant stopped the brushing of the roof, and that this was a considerable time before this accident. It was a question to be determined by the jury, whether this roof was so low at that place as to constitute a dangerous condition. *Piazzi v. Kerens - Donnewald Coal Co.* 262 Ill. 30. If it was a dangerous condition, then it was the duty of defendant, through its

one side and over 8 feet on the other. It is recommended that taking the evidence of the witnesses for the plaintiff as to the place where plaintiff fell, this place where the roof had such a drop could not have been the place where the plaintiff's head hit the roof. These witnesses did not pretend to have ~~known~~ the distance from the door, nor to know precisely how far in the entry way it was that he fell. Plaintiff testified that as he ran to get away from the trip, he held his head down low. There is no ~~denial~~ denial in the evidence of the fact testified to at least by two witnesses that he did not hold his head down at a low place in the foot of the trip. There is no statute defining the height which roof is required to be in such an entry way. It is evident that an entry way can be so low as to be dangerous to those employees who are required to pass back and forth therein between the shaft and the place of work. We think it the spirit of the mining act that if such an entry way is so low as to be dangerous to employees rightfully travelling therein, that this is a condition which is required to be marked and to be removed. It is clear that defendant had ordered this roof to support the lines where plaintiff struck his head and fell and that when defendant stopped the striking of the roof, and that this was a considerable time before this accident. It was a question to be determined by the jury, whether this roof was so low at that place as to constitute a dangerous condition. *Lissak v. Kereus - Lonsdale Coal Co.* 262 Ill. 50. If it was a dangerous condition, then it was the duty of defendant, through its

proper officers, to cause a conspicuous mark to be placed thereat and to make a report thereof in the book kept for that purpose and to permit no coal miner to enter there until the dangerous condition had been removed, and to cause the roof to be brushed and the danger to be removed. Defendant did none of these things. We conclude the jury were justified in finding that this was a dangerous condition.

Defendant introduced in evidence a rule of the company requiring miners to keep off the hauling ways and away from the shaft bottom during working hours while the mine was in operation. This rule was ignored in an instruction given for plaintiff. Section 12 of said Mining Act provides that whenever men who have finished their day's work or have been prevented from further work, shall come to the bottom to be hoisted out, an empty cage shall be given them for that purpose. Another section of the statute provides for places of refuge at the sides of these passage ways, and not over 60 feet apart. We think it clear that this means that men may lawfully be in the passage way at any time and especially when they have finished their work or have been prevented from further work. The operator of the mine could not lawfully adopt a rule that would prevent the miner from exercising the rights given him by the statute. We hold that the court did not err in ignoring this rule of the company in its instructions. If plaintiff was negligent in disregarding this rule, that would not be a defense to the first additional count, under which this recovery was had.

Instruction No. 10, given at the request of plaintiff,

proper officers, to cause a competent party to be placed thereat and to make a report thereof in the book kept for that purpose and to permit no coal miner to enter there until the dangerous condition had been removed, and to cause the rocks to be pushed and the danger to be removed. Defendant did none of these things. We conclude the jury were justified in finding that this was a dangerous condition. Defendant introduced in evidence a rule of the company requiring miners to keep off the hauling ways and away from the shaft bottom during working hours while the mine was in operation. This rule was ignored by the instruction given to the jury. Section 12 of said Mining Act provides that whenever men who have finished their day's work or have been prevented from further work, shall come to the bottom to be hoisted out, an empty cage shall be given them for that purpose. Another section of the statute provides for places of refuge at the sides of these passage ways, not over 60 feet apart. We think it clear that this passage way may lawfully be in the passage way at all times and especially when they have finished their work or have been prevented from further work. The object of the rule could not lawfully adopt a rule that would prevent a miner from exercising the rights given him by the statute. We hold that the court did not err in limiting this rule of the company in its instructions. If plaintiff is negligent in disregarding this rule, that would not be a defense to the first additional count, under which this recovery was had. Instruction No. 10, given at the request of plaintiff.

relating to the method of ascertaining the damages, if they found plaintiff entitled to recover, told the jury among other things that they might consider whether the impairment of plaintiff's health and physical condition "is of a permanent nature or otherwise, and if you believe from the evidence that such impairment is permanent, then you may consider to what extent, if shown by the evidence." It is contended that there was no evidence that plaintiff's ~~inj~~ injuries were permanent and therefore this instruction was erroneous. The injury was on August 29, 1912. The trial began on January 21, 1914. Plaintiff's physician testified that shortly before the trial he found that plaintiff's right knee was one-half inch larger in circumference than the left, and that this indicated that the inflammation in that knee from which he had suffered still existed there, but he gave it as his opinion that in 6 or 8 months it would be normal. This indicated that there was some degree of permanence in the injury. The jury also saw the plaintiff on the witness stand and might be able to form some opinion of his condition from his appearance before them. The instruction also limited their consideration to the evidence, and did not tell them that a permanent condition existed. We think it was not reversible error to give this instruction, nor do we find any reversible error in the other matters suggested by the defendant.

The judgment is affirmed.

...to the point of ascertaining the nature, it
...plaintiff testified, however, told the jury
...other things that they might consider that the
...of plaintiff's health and physical condition
...is of a permanent nature or otherwise, and if you believe
...the evidence that such impairment is permanent, then
...any conclusion to that extent, if shown by the evidence."
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...injuries were permanent and therefore this instruction
...was erroneous. The injury was on August 29, 1912.
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...other matters suggested by the defendant.
...The judgment is affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this thirteenth
day of October, in the year of our Lord one thousand nine
hundred and fourteen.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

193 I.A. 146

J. G. MISCHKE, Sheriff.

R. H. Daniel Apr 8 / 15

585

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

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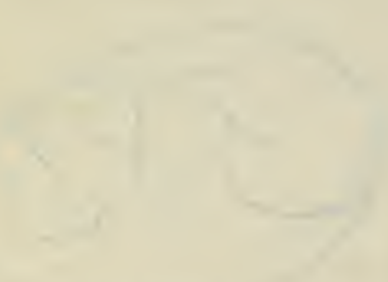
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No. 5913.

Henry Boehning, for the use of)
himself and Connecticut Fire
Insurance Company,

Defendant in Error.

vs

Elgin, Joliet & Eastern Railway
Company,

plaintiff in Error.

Insert folios 1-9

~~Opinion by~~ *CARTER, S. J.*

Mr. Presiding Justice Carter delivered the opinion of the court.
Plaintiff in error, defendant below, the Elgin, Joliet

& Eastern railway Company, hereinafter called defendant, owns and operates a belt line railroad extending from Joliet to Waukegan, Illinois. It crosses the C. M. & St. P. Ry. at ^{Chicago, Pauly} ~~Waukegan~~ ^{Waukegan} ~~Spaulding~~ a few miles from Elgin and is at that point a single track road running about north from Spaulding and crossing about a mile north at nearly a right angle by a public highway. Defendant in error, plaintiff below,

Henry Boehning, hereinafter called plaintiff, owned a farm on the south side of the highway east of and adjoining the defendant's right of way, with farm buildings located about three hundred ³⁰⁰ feet from defendant's track. It is up grade from Spaulding north to and for some distance beyond this point, and the railway track is below the natural level of the ground opposite plaintiff's premises. At about eleven ^{27 1907} A.M. November 27, 1907, there was a strong wind from the southwest, and a fire started in the south side of a straw stack at a point ~~seven or eight~~ ⁷ feet from the ground and 345 feet east

*Accident brought on
ground that is below
for the destruction
of farm buildings
by a fire, alleged
to have been caused
by sparks from a
passing locomotive.
From a judgment
of \$7600 in favor of
the plaintiff.*

Henry Boehning, for the use of)
himself and Connecticut Fire
Insurance Company,
Defendant in Error.
vs
Elgin, Joliet & Eastern Railway
Company,
Plaintiff in Error.

Elgin, Joliet & Eastern Railway Company, defendant in error, the Elgin, Joliet
& Eastern Railway Company, defendant in error, the Elgin, Joliet
and operates a railroad extending from Joliet to
Elgin, Illinois. It crosses the O. & N. R. R. at
a point a few miles from Elgin and at that point a
single track runs north-north-west from Elgin and
crosses about a mile north of nearly a right angle by a
cut to Highway. Defendant in error, plaintiff below,
Henry Boehning, hereafter called plaintiff, owned a farm
on the south side of the highway east of and adjoining the
defendant's right of way, with farm buildings located about
three hundred feet from defendant's track. It is up grade
from Elgin north to and for some distance beyond this
point, and the railway track is below the natural level of
the ground opposite plaintiff's premises. At about eleven
A.M. November 27, 1907, there was a strong wind from the south-
west and a fire started in the south side of a straw stack at
a point seven or eight feet from the ground and 345 feet east

of the center line of defendant's track and resulted in the destruction of all the farm buildings. Plaintiff claims that the fire was set by a spark from an engine of defendant's and he brought this suit to recover damages for the loss, and had verdict and judgment for ~~\$7600.~~ ^{\$7600} in the court below.

The facts so far as above stated are not controverted, neither is there any question ^{as} to the value of the property destroyed, or as to any ruling of the court on the evidence or instructions, except in refusing a peremptory instruction directing a verdict for the defendant. We are asked to reverse the judgment without remanding the case solely on the ground that the verdict is not supported by the evidence, and it is insisted there is no credible evidence that the fire was set by an engine, because it is said no engine passed the premises at a time when it could have so caused the fire, and if it had so passed it is impossible that it could have thrown a cinder or spark capable of setting a fire that distance.

It appeared in evidence introduced by the plaintiff that the only people on the premises for ~~the~~ ² or ³ ~~three~~ hours before the fire were a housekeeper in the dwelling house ¹²⁰ one hundred and twenty feet north of the straw stack, and plaintiff's son ¹³ ~~thirteen~~ years old working with the hired man about the farm; that there was a fire in the kitchen stove in the dwelling house and no other fire on the premises. The son, Leonard Boehning, testified that he and the hired man came from the field to the barn and the hired man drove into the basement to do some work there, while he, the boy, stayed outside to shut a gate; that he was outside about ¹⁰ ~~ten~~ minutes and in the vicinity of the straw stack and noticed no fire, but he

of the center line of defendant's track and resulted in the
destruction of all the farm buildings. Plaintiff
did not see any fire or any smoke from an engine or defendant's
and he brought this suit to recover damages for the loss of his
property and for the loss of his business. Plaintiff
The facts as far as have been stated are not controverted.
Plaintiff is there any question as to the value of the property
is a jury to make a ruling of the court on the evidence
of instructions, except in relation to a temporary instruction
defendant's verdict for the plaintiff. We are asked to
reverse the judgment without examining the evidence of the
court that the verdict is not supported by the evidence.
It is stated that there is no credible evidence that the fire
was set by an engine, because it is said no engine passed the
place at a time when it could have so caused the fire, and
it is stated that it is impossible that it could have
been a spark or spark pipe or setting a fire at distance.
It appeared in evidence introduced by the plaintiff that
the only people on the premises for two or three hours before
the fire were a housekeeper in the dwelling house one hundred
and twenty feet north of the straw stack and plaintiff's son
thirteen years old working with the hired man about the farm;
that there was a fire in the kitchen stove in the dwelling
house and no other fire on the premises. The son, George
Bohman, testified that he and the hired man came from the
field to the barn and the hired man drove into the basement
to do some work there, while he, the boy, stayed outside to
shut a gate; that he was outside about ten minutes and in
the vicinity of the straw stack and noticed no fire, but he

saw a freight train with one engine and ²⁵ twenty-five to ⁴⁰ forty cars coming north from ¹⁴ Spaulding and about half way from Spaulding to the highway crossing, that it was not coming fast and he could hear a heavy exhaust, and see smoke coming from the stack like a black cloud; that he went into the barn where the hired man was working and stayed not more than ¹⁵ fifteen minutes, and when he came out the stack was on fire; that he and the hired man and a Mr. Britton who drove into the yard, tried to smother the fire with blankets and water but in a few minutes it got so hot they had to abandon that effort. There is another east and west road about ² two miles north of plaintiff's premises. John Hartman testified that he is a farmer and at the time of the fire lived on this road a little over half a mile east of the line of defendant's railroad; that he saw the fire; that he started from his home about ^{10:30} ten thirty A.M. and drove west towards Elgin and stopped about ⁶ six rods east of the railroad crossing to let a north bound freight train pass; that there were perhaps ³⁰ thirty cars drawn by one engine, with a lot of black smoke coming out of the engine; that he felt a few cinders flying around and the train was not running very fast; that he drove on after the train passed, and when about ⁴⁰ forty rods west of the track, he looked south and saw a lot of smoke and in a few minutes saw flames from plaintiff's burning buildings. There is ^{still} another east and west highway about ² two miles farther north ¹⁴ that crosses defendant's right of way under the track. Dr. Sharp a practicing physician of Elgin, ¹⁴ testified that he had for ¹⁴ some years practiced in the vicinity of plaintiff's home and was well acquainted with that part of the country; that on the ^{fore} afternoon of the day of the fire he had been

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saw a freight train with one engine and twenty-five to forty
cars coming north from the south and about a mile from
the bridge crossing, that it was not coming fast
and he could hear a heavy exhaust and see smoke coming from
the stack like a black cloud; that he went into the grove
where the hired man was working and stayed not more than
fifteen minutes, and when he came out the attack was on him;
that he saw the hired man and a few others go into the
grove and see another fire with smoke and hear
the engine coming and that he did not stay long and went
back to the house. That is all he saw and heard about the
fire. John H. Hester, testified
north of plaintiff's premises. That he lived on a farm
that he had a barn and at the time of the fire lived on a
road a little over half a mile east of the line of defendant's
railroad; that he was at the time, that he started from
his home about ten thirty A.M. and drove west toward the
road and stopped about six rods east of the railroad crossing to
let a north-bound freight train pass, that there were perhaps
thirty cars drawn by one engine and a lot of black smoke
coming out of the smokestack; that he felt a few cylinders flying
around in the train was not running very fast; that he
drove on after the train passed and then about forty rods
west of the track, he looked south and saw a lot of smoke and
in a few minutes saw flames from plaintiff's burning buildings.
There is another east and west highway about two miles farther
north than the crossing defendant's right of way under the track.
That a practicing physician of plaintiff testified that he
was called and was practicing in the vicinity of plaintiff's
home and he was acquainted with part of the country;
that on the afternoon of the day of the fire he had been

visiting patients in the country and was east of the defendant's right of way driving west on the last mentioned road and reached the railway crossing about 11 o'clock; that he was driving a horse afraid of the cars when they passed over head; that he stopped about ²⁰ twenty rods east of the crossing to let a north bound train pass; that it was a long train, perhaps ³⁵ thirty-five or ⁴⁰ forty cars, drawn by a common size engine running slow and throwing out a large amount of smoke and cinders; that there was a strong wind from a little southwest and cinders from the engine struck his buggy; that he drove across the right of way after the train passed, and when he got from an eighth to a fourth of a mile from the viaduct he saw smoke which he knew was at plaintiff's premises, and ~~drove~~ immediately there where he found many people, and all the buildings on fire.

There were other witnesses for plaintiff testifying as to various matters about the fire, its progress, efforts to extinguish it, etc. It appears that it was a dry time, that the ground and ^T cracks were dry and there was a high wind blowing from south of west, perhaps nearly due southwest, the witnesses differ as to that; They also differ slightly as to the time of day, as witnesses usually do on such occasions, but they connect what they say about the passing train with seeing the fire in such a way that there is little ground for supposing that they are mistaken about the relative time of the passing of the train and the fire, and while they are testifying some years after the event, it was a matter not likely to be forgotten. It cannot reasonably be said that no train went north just before the fire started and that the three witnesses that testified to the fact were mistaken in their testimony because of the frailty of human memory.

visiting patients in the country and was east of the
detendant's right of way driving west on the last ment-
ioned road and reached the railway crossing about 11 o'clock
P.M. after driving a horse afraid of the cars when they
passed over head; that he stopped about twenty rods east of
the crossing to let a north bound train pass; that it was a
long train, perhaps thirty-five or forty cars, drawn by a
co. min size engine running slow and throwing out a large
amount of smoke and cinders; that there was a strong wind
from a little south-west and cinders from the engine struck
his buggy; that he drove across the right of way after the
train passed and when he got from an eight to a fourth
of a mile from the viaduct he saw smoke which he knew
was at plaintiff's premises and drove immediately there
where he found many people and all the buildings on fire.
There were other witnesses for plaintiff testify-
ing to the same facts as above stated.
It appears that it was
a dry time, that the ground and stacks were dry and there
was a strong wind blowing from a south of west, perhaps nearly
due south at the time of the fire.
They
also testified to the time of day, the witnesses
nearly all on each occasion, but they cannot state what they
saw at the burning time. With regard to the fire it is such
a fact that there is little ground for supposing that they
all stated about the relative time of the burning of the
train and the fire, and while they are testifying some
years after the event, it is a matter not likely to be
forgotten. It cannot reasonably be said that no train
went northward before the fire started and that the
three witnesses that testified to the fact were mistaken
in their testimony because of the frailty of human memory.

The court in passing on the motion to direct a verdict for the defendant had to assume the truth of this testimony and if true it seems to us sufficient to support a verdict for the plaintiff; therefore the court did not err in refusing to take the case from the jury.

But the defendant introduced evidence that seems about as conclusive that no train went north from Spaulding on the forenoon of that day. It introduced in evidence its train sheet kept by the train dispatcher at Joliet. According to this sheet there was no train that went north out of Spaulding and up the grade on the day in question, prior to the fire, and not until ~~four~~⁴ o'clock in the afternoon after the fire. There were several trains that went south on the morning in question, the one nearest to the time the fire was discovered was a double-header pulled by engine ~~ninety-eight~~^{No. 98} and pushed ~~fifty-seven~~^{22 57}. It passed the farm at about ~~ten~~¹⁰ o'clock A.M. arriving at Spaulding at ~~ten~~^{10:10} A.M. There was no fire on the premises when it passed, and ~~the~~^{the} court instructed the jury at the instance of defendant that there was no evidence that either of those engines set the fire. The next train going south was at about ~~twelve~~¹² M. at which time the fire was well under way and the buildings substantially burned, there was a train from the south that reached Spaulding that day at ~~11:15~~^{11:15} A.M. and left returning south at ~~12:45~~^{12:45} P.M. There was a station (Sutton) ~~four and three tenths~~^{4 3/10} miles north of Spaulding and another (Barrington) ~~five and three tenths~~^{5 3/10} miles

The Court in reaching its decision in *United States v. Galt*, 196 F.2d 100, 101 (9th Cir. 1952), was divided 5-4. The majority held that the defendant had to show that the government was negligent in failing to discover the fraud. The dissenting opinion, written by Chief Judge W. L. Gurnea, stated that it was not necessary for the government to prove that the defendant was negligent in failing to discover the fraud. The dissenting opinion stated that the government was not required to prove that the defendant was negligent in failing to discover the fraud. The dissenting opinion stated that the government was not required to prove that the defendant was negligent in failing to discover the fraud.

and the defendant introduced evidence that said
about a corridor but no train went north from
on the forenoon of that day. It introduced evidence
the train sheet kept by the train dispatcher
According to this sheet there was no train that went north
of Seattle and up the coast on the day in question.

There was no fire on the
at about ten o'clock A.M. A driver at
discovered as a house-keeper
to the fire in the morning in question, the one he met
There were several trains that
prior to the fire, and was still there at about ten o'clock in the

[illegible]

northerly from Sutton, there were side tracks at these various stations and at Barrington connection with the through line which necessitated considerable yard trackage. It appears that there might have been considerable switching on side tracks and tracks in the yard without any record of it on the train sheet; but in the ordinary course of business the train seen by plaintiff's witnesses would not have gone north to the point where Dr. Sharp said he saw it without a record reported ~~on~~ to the train dispatcher. The train men of the ~~two~~² trains passing south that forenoon and of the train that came north to Spaulding and returned, testified in the case as did also the agent at Spaulding and a witness named McCarthy who was employed at Spaulding by the defendant and the St. P. Ry. Co. ^{and railway} jointly, at the crossing and reported every train ^{company} that passed to defendant's dispatcher at ~~Ellet~~^{Goliet}. The testimony of all these witnesses corroborated the statement in the train sheet as to the passing of trains on the day in question. No record of that day kept at the office in Spaulding was produced. And by way of impeachment of the witness McCarthy, the proper foundation being laid, it was testified by the plaintiff and his attorney that they met McCarthy some time before the trial and the attorney asked him if he saw a train going north from the ~~Spaulding~~^{Spaulding} station, by the Boehning farm, at or about ~~eleven o'clock~~¹¹ A.M. on November 27, 1907, and that McCarthy replied yes, a freight train went by, north, by

[illegible]

Boehning's place, heavily loaded, with a small engine, and that a few minutes afterwards his attention was called to the fire on the Boehning place. When McCarthy's attention was directed to this statement he at one time answered that he did not remember and then positively denied making it, and his answer that he did not remember ^e perhaps came from his not understanding the question; but it is quite likely that the jury believed that he did make the statement and that it influenced their verdict. We cannot say from the whole evidence that the jury were not warranted in finding that the freight train did pass north as stated by plaintiff's witnesses.

It is urged that it is impossible that a spark should have been thrown from the engine to the stack even if it be conceded that the engine was passing and throwing out smoke and fire. As we have seen the engine when directly west of the stack was ~~three hundred and forty~~ ³⁴⁵ ~~feet~~ ⁷ distance, and if we assume the wind blowing from due southwest and a spark shot directly like a rifle ball in the direct course of the wind, it would have traveled about ~~five hundred~~ ⁵⁰⁰ feet before reaching the point on the stack where the fire started. If it be assumed that a spark from the engine set the fire it probably traveled ^{some} ~~some~~ distance between the two extremes named, presumably however not in a direct line, sparks have a way of blowing in the air and changing their course before settling on the ground. It incidentally appeared in the evidence that sparks from the burning buildings set

Boehning's place, heavily loaded, with a small engine, and that a few minutes after his attention was called to the fire at the Boehning place. When McGarity's attention was directed to this statement he at one time answered that he did not remember and then positively denied making it, and McGarity said he did not remember. He said he could not remember the location; but it is quite likely that the jury believed that he did make the statement that it was the road that was involved. We cannot say that the whole evidence that the jury were not convinced in finding that the freight train did pass north as stated by McGarity's witnesses. It is a fact that McGarity's witnesses did not know it had been seen from the bridge to the south even if it had been seen from the bridge and moving out of the station. McGarity said he had seen the engine when directly west of the stack was three hundred and forty-five feet distance, and it was the wind blowing from due southeast and a spark shot directly into the air. The direct course of the spark could have traveled about five hundred feet before reaching the point on the stack where the fire started. It is assumed that the spark from the engine at the time it was traveling was between the two stacks, and McGarity said he never saw a spark at that time, and alone way of blowing in the air and blowing from the stack alone at the ground. It is probably assumed in the evidence that sparks from the burning building set

a fire a half mile distance in a field, and it is common knowledge that sparks from burning substances will set fires at considerable distances. Counsel say this is not true of sparks from a locomotive engine and quotes from Goss' Work on Locomotive Sparks, page 128, to the effect, that a large percentage of all sparks thrown out and the largest individual specimens are found within a distance of ¹⁰⁰ one hundred feet from the center of the track, which distance fixes the danger line; but this is neither law or common knowledge. Counsel say it is a question of expert knowledge and argue that the plaintiff should have introduced expert evidence on the question of distance that a burning cinder might be carried from a locomotive engine. No case is pointed out where such evidence was introduced by the plaintiff and many cases are found where the jury were permitted to find from their common knowledge of affairs that sparks from an engine did set a fire. As said in *First National Bank v. L. E. & W. R. Co.*, 174 Ill. 36, ^{of Hooperston} it is difficult in any case to prove that the fire was caused by a spark from a locomotive, by a witness who actually saw the spark falling upon the property destroyed, and who actually saw the fire arise from such falling of the sparks. And where there is no evidence of any other agency which could have caused the fire, verdicts of juries have often been sustained as in *C. & A. R. Co. v. Esten*, 178 Ill. 192, on circumstantial evidence. It may be true that the distance which the cinder must have traveled is in this case extreme, but we conceive no principle of law under which we can say that

the jury may act on their common knowledge of affairs in determining the question of the distance is a given number of feet and that their verdict must be supported by expert testimony if that distance is exceeded, though it is no doubt true that the distance might be so great that it would be within the common knowledge of mankind that the fire could not have been so set and a verdict resting on a finding that it was could not be sustained. We do not think this case falls within that class and do not feel warranted in saying that the jury might not reasonably find that a flying cinder in the high wind that was then blowing traveled the given distance and set the fire in question.

Nothing in the record points to any other cause of the fire. It was a question of fact for the jury to determine whether it was caused in the manner alleged. The evidence was conflicting and a verdict might well have been found either way. The jury and the trial Judge had the advantage of seeing the witnesses and hearing them testify and we do not feel authorized to disturb the verdict approved as it is by the trial judge.

The judgment is affirmed.

Affirmed.

Affirmed.

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the jury act on their common knowledge of affairs in
determining the question of the distance as a given
number of feet and that their verdict must be supported
by expert testimony if that distance is exceeded, though
it is no doubt true that the distance might be so great
that it would be within the common knowledge of mankind
that the fire could not have been so set and a verdict
resting on a finding that it was could not be sustained.
We do not think this case falls within that class and do
not feel warranted in saying that the jury might not
reasonably find that a flying cylinder in the high wind
that was then blowing traveled the given distance and set
the fire in question.

Nothing in the record points to any other cause of
the fire. It was a question of fact for the jury to
determine whether it was caused in the manner alleged.
The evidence was conflicting and a verdict might well
have been found either way. The jury and the trial
judge had the advantage of seeing the witnesses and
hearing them testify and we do not feel authorized to
disturb the verdict approved as it is by the trial

The judgment is affirmed.

Judge.

STATE OF ILLINOIS, {
SECOND DISTRICT. ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

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1970

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present -- The Hon. DUANE J. CARNES, Presiding Justice

Hon. DORRANCE DIBELL, Justice

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff

193 I.A. 167

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A.D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Arthur Keithley,

vs.

City of Peoria

Appeal from Peoria County Court.

384

Carnes P. J.

Appellant Arthur Keithley, August 16, 1912, sued appellee City of Peoria, before a Justice of the Peace, for damages claimed to have been done to a residence property by lowering the grade of the street in front thereof. A trial, on appeal, in the County Court, resulted in a verdict and judgment for the defendant; from which judgment this appeal is prosecuted.

In the Spring of 1903, the then owner of the property laid a six foot cement sidewalk in the front of it. The sidewalk was laid with permission from the city authorities, at a grade designated by them for that walk, and corresponding with the grade of the continuation of this walk at each end. The owner of the lot graded it, made a driveway at one side and laid a cement walk from the house to the sidewalk, all in conformity with the grade of the sidewalk. Afterwards, in the same year, appellant purchased the property and has ever since been in possession of it by his tenant.

In 1910 the City passed an ordinance for the paving of the street with brick, and cement curb. The ordinance in specifying the grade referred to the grade of the street "as heretofore established"; but it does not appear that the city had theretofore established a grade for that street at that place, and the testimony makes it quite certain that it had not, and that all it had done in that direction was to dictate the grade at which the sidewalk should be laid, and maintain the street in front of it, at perhaps varying grades, caused by working the dirt street. The paving was completed in the Fall of 1911. This being an action begun in Justice Court, with, consequently, no written pleadings,

appellant was entitled to recover for any actionable injury that he could prove within five years of the beginning of this suit, or since August, 1907; but his main contention is that he was injured by lowering the street when the paving was put in; in 1911. He claims, and there is evidence tending to support his claim, that when the sidewalk was laid in 1903, it was on a level with, or lower than, the street in front of it; that there was a sewer laid in the street in 1908 or 1909, and at that time the grade of the street was substantially lowered; that when this pavement was put in, there was another lowering of the street so that it became impossible to drive heavy loads from the street on to his premises, and practically destroying his means of egress and ingress so that he would be compelled at considerable expense to re-arrange and re-grade his lot. There is a ~~sharp~~ conflict of testimony as to the grade of the street at the time the sidewalk was built, and from that time to the time when the pavement was laid. It appears without contradiction that before the pavement was laid there was a gutter of brick, or brick and stone, along the side of the street next to appellant's premises, and that the water had washed it out in front of his driveway so that a wooden bridge was required, and kept there, to enable teams to drive from the street on to the driveway. This was the condition at all times after the sewer was put in, and for some time before, but for how long, there is some conflict in the evidence. There is quite convincing evidence that appellant has much better and easier access to his property from the street now, than at any previous time within the five year limitation; and it is certain he could not, either after the pavement was put in, or for several years before that time, drive from the street on to his premises without making use of a bridge projecting from his street line into the street; and the evidence makes it quite certain that the present cement gutter is not so low by six inches as was the old brick gutter that was maintained there before the pavement was laid.

Appellant contends that the City should be held to have established a grade to the street before the time of the paving ordinance, because it cites in that ordinance that there was an established grade, and because it did establish the grade of the sidewalk built in 1903, and in the absence of other evidence, that should be held to control the grade of the street. We do not think the fact that the ordinance recited a previously established grade, is of much importance when taken with the rest of the record that indicates there had been none established; and if there had been one established and the City is called on to respond in damages for departing from the established grade, it would be a part of the plaintiff's case to show what that grade was. Neither do we think the fixing of the grade of the sidewalk in 1903, has anything to do with the grade of the street before that time, or to be maintained after that time. There is some evidence that as a rule there was a certain distance maintained between the grade of the street and the sidewalk as a matter of practice; but the evidence shows that in the City of Peoria there was ~~it~~ no fixed and uniform rule as to those respective grades.

The court at the instance of Appellant instructed the jury that if the City gave a grade in front of the property and a sidewalk built according to that grade; and at any time within five years prior to the commencement of the suit, the City changed such grade in a way to injure plaintiff's property, then the City was liable. That the right of ingress and egress is protected by the Constitution and if the City in making the improvement damaged plaintiff's right to pass to and from his property, then ~~they were~~ ^{it was} liable. That if they believed the City changed the grade of the street in front of plaintiff's property, and by so doing damaged his property, then the City was liable; and that it is no defense that the City in so doing was operating under a valid ordinance. That it was the duty of the City to keep the street in front of plaintiff's property in a reasonably safe condition, and if the grade of the street has been changed so as to injure plaintiff's

property then the City was liable, regardless of whether plaintiff was required to bridge the gullies in the street before it was paved in order to get to and from his property. And the Court refused to instruct for plaintiff, that if the City had changed the grade and damage has resulted to plaintiff's property, that it was liable even if the roadway of the street was lower before it was paved than it was after. The refusal of this instruction is complained of, but its substance was covered by other instructions given, which repeated to the jury that any change in the grade of the street that damaged plaintiff's property was actionable. This is not true as an abstract proposition; if the property owners' rights of ingress and egress are not interfered with many things may happen in the care of the streets affecting injuriously the market value of his property without subjecting the City to liability. *Rigney v. City of Chicago*, 102 Ill., 64; *Barrows v. City of Sycamore*, 150 Ill. 588; *City of Chicago v. Jackson*, 196 Ill. 496. It is sufficient to say that these instructions were as favorable to appellant as he could ask.

The Court instructed the jury at the instance of appellee that the street was lower than the sidewalk before it was graded, there was no obligation on the City to raise it to the level of the sidewalk. That the city was not bound to grade its streets to afford access with a bridge into adjoining property where such access could not be had before the streets were graded, and that if the street in question before it was graded was in such condition that plaintiff could not drive into his property without the use of a bridge extending into the street, that it was the right to remove the bridge and was under no obligation to place the street in condition so that plaintiff could drive onto his property without a bridge; and that the plaintiff had no right to maintain the sidewalk leading from the sidewalk line into the street and could not base a claim for damages on the action of the city in removing it. Defendant's instructions may be said to ignore the question of a grade established by the City; but as applied to the evidence in this case we do not find any error in them. There is no evidence in the record from which.

the jury could have found or considered any grade established by the city before the time of the paving ordinance.

The evidence was also conflicting on the question whether the market value of the premises was lessened by the improvement of the street and there was ground for the jury to find that even if ingress and egress had been interfered with there was no depreciation in the market value occasioned by the improvement, or rather that there was no special damage to plaintiff's property occasioned by any act of the city within the five year period of limitation.

It is said by counsel that the jury visited and viewed the premises. If they did they were able to better understand the evidence, and as we read the record it seems to us that the evidence shows that there was no interference of appellant's means of ingress and egress to his premises, except in taking away a bridge that he had for a long time used for that purpose; that the bridge was maintained in the street by the sufferance of the city, and that he has no cause for complaint that he is no longer permitted to maintain it there, and that there is no other injury shown, and nothing else that would tend to depreciate the market value of appellant's premises.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of July,

in the year of our Lord one thousand nine hundred and sixty - one

Paul V. Wunder
Clerk of the Appellate Court.

6010

591

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

193 I.A. 178

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6010.

Joseph McFadden, appellant.

vs

Appeal from Putnam.

Adam Deck, John Dore and

James McCutcheon, appellees.

Carnes P. J.

Joseph McFadden, the appellant, sued Adam Deck, John Dore and James McCutcheon, the appellees, in assumpsit and filed ^{an}a declaration consisting of the common counts and two special counts ~~alleging that appellees gave Marsh Co. their~~ ^{on} two promissory ^{notes} which were afterwards assigned by Marsh Co. to appellant, and default in payment thereof, and filed with the declaration ~~copies of the notes~~ ^{on} which notes were in the common form signed by the three appellees, but at the left of their signature appeared the words "Commissioners of Hennepin Drainage District". Appellees filed a general and special demurrer to the two special counts, setting out as cause for special demurrer that it does not appear whether Marsh Co. is an individual copartnership or corporation. The record shows that ~~the~~ only the general demurrer was brought up for hearing, and the court sustained that demurrer; thereupon appellant dismissed the common counts from the declaration and elected to "abide by the counts to which a general demurrer was sustained" and judgment was entered against the plaintiff (appellant) that he take nothing by his writ or suit and that the defendants go hence without day, and for costs.

It appears from the arguments of counsel that the question whether the notes were on their face the obligation of appellees or of the Drainage District, was presented to the Court on the assumption that the copies of the notes were a part of the declaration, and that the general demurrer

Joseph McFarland, appellant.

Appeal from Pittman.

vs

Adam Deck, John Dore and

James McCutcheon, appellees.

Carnes P. J.

Joseph McFarland, the appellant, sued Adam Deck, John

Dore and James McCutcheon, the appellees, in assumpsit

and filed a declaration consisting of the common counts

and two special counts alleging that appellees gave to

plaintiff two promissory notes which were afterwards

signed by Marsh Co., to a plaintiff, and default in payment

thereof, and filed with his declaration copies of the notes

in question, which notes were in the common form signed by the

three appellees, but at the left of their signatures appeared

the words "Commissioners of Hennepin Drainage District".

Appellees filed a general and special demurrer to the two

special counts, setting out as cause for special demurrer

that it does not appear whether Marsh Co. is an individual

partnership or corporation. The record shows that the only

the general demurrer was brought up for hearing, and the

court sustained that demurrer; thereupon appellant dismissed

the common counts from the declaration and elected to "abide

by the counts to which a general demurrer was sustained"

and judgment was entered against the plaintiff (appellant)

that he take nothing by his writ or suit and that the

defendants go hence without day, and for costs.

It appears from the arguments of counsel that the question

whether the notes were on their face the obligation of ap-

pellees or of the Drainage District, was presented to the

Court on the assumption that the copies of the notes were a

part of the declaration, and that the general demurrer

was sustained because the court held they were not the obligations of the appellees. But appellant asks a reversal on the ground that the two counts of the declaration were each good on general demurrer, and that the copies of the notes were no part of the declaration and cannot be noticed on demurrer. It is true that the copies of the notes were no part of the declaration. Harlow v Boswell 15 Ill. 56, Hippach v First National Bank, 169 Ill. 515. Boyles v Chytraus, 175 Ill. 370. Appellees do not deny this position but say it is unfair to raise that question because it was not raised in the court below, and could have been easily avoided had the point been there made. This may be true but it still remains that they have obtained the judgment of the court on a question not presented by the record. Whether the notes were on their face the obligations of appellees or of the Drainage District, is a question not presented to the trial court, and therefore no such question is before this court. The judgment must be reversed and the cause remanded.

Reversed and remanded.

was sustained because the court said that the
application of the exception, but appellant asks a reversal
on the ground that the two agents of the defendant were
each paid on General Demurrer, but that the copies of the
notes were no part of the deposition and cannot be received
on demurrer. It is true that the copies of the notes
were no part of the deposition. *Hallow v. Hallow*, 115 Ill.
68, *Hirbach v. First National Bank*, 228 Ill. 412, *Boyles v.*
Capitana, 175 Ill. 270. Appellant does not deny this position
but says it is unfair to raise that question because it
was not raised in the court below, and could have been easily
avoided had the point been made. This may be true
but it still remains that they have obtained the judgment
of the court on a question not presented by the record.
Whether the notes are in their true and authentic state
believe or of the Defendant-Debit, is a question not pre-
sented to the trial court, and therefore no such question
is before this court. The judgment must be reversed and the
cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff.

193 I.A. 180

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6016

John Funk, Deft. in error.

vs Error to LaSalle.

Chase Fowler, Pltf. in error.

Carnes P. J.

the Plaintiff in Error
Plaintiff in error, Chase Fowler, is a practicing lawyer, and for some time prior to July 12, 1906, had professional and business dealings with John Funk the defendant in error, and in 1904 ^{part} had given him a writing in the form of an article of agreement for the conveyance of certain lands in Section 11 in Township 33, Range 4, LaSalle County Illinois, on conditions therein named; but which was intended as security for moneys loaned and indemnity against loss on liabilities assumed by Funk as surety on notes of Fowler's; and in 1905 Fowler gave Funk another similar writing covering other lands as security and indemnity in other like transactions. There was a prior mortgage lien on some of these lands, and in June 1906, there were judgments against Fowler and it was necessary to raise five or six thousand dollars to satisfy such indebtedness; and July 12, 1906, Fowler gave Funk a Quit Claim Deed of ^{the} said land for ^{an} the expressed consideration of \$12000.00, (which is not claimed to be the true consideration), and Funk by mortgaging the land, secured a loan of \$5000.00 and with the money so obtained and an additional sum furnished by himself, he satisfied those debts. ^{After which the parties signed an agreement as follows:}
On July 31, 1906, the parties signed an agreement as follows:
"July 31, 1906. This is to certify that John Funk and Chase Fowler have this day settled all past demands and claims to date, and C. Fowler is to finish the Kempton matter in which Mr. Funk is partner.

Chase Fowler

John Funk."

John Frank, Deft. in error.

vs
Error to Appellate.

Chase Fowler, Plff. in error.

James P. J.

Plaintiff in error, Chase Fowler, is a practicing lawyer, and for some time prior to July 18, 1906, had professional and business dealings with John Frank the defendant in error, and in 1904 had given him a writing in the form of an article of agreement for the conveyance of certain lands in Section 11 in Township 35, Range 4, LaSalle County Illinois, on conditions therein named, but which was intended as security for money loaned and ultimately against loss on liabilities assumed by Frank on notes of Fowler's; and in 1905 Fowler gave Frank another similar writing covering other lands as security and indemnity in other like transactions. There was a prior mortgage lien on some of these lands, and in June 1906, there were judgments against Fowler and it was necessary to raise five or six thousand dollars to satisfy such indebtedness; and July 18, 1906, Fowler gave Frank a Quit Claim Deed of said land for the expressed consideration of \$1500.00, (which is not claimed to be the true consideration), and Frank by mortgaging the land secured a loan of \$2000.00 and with the money so obtained, and an additional sum furnished by himself, he satisfied those debts. On July 31, 1906, the parties signed an agreement as follows: "July 31, 1906. This is to certify that John Frank and Chase Fowler have this day settled all past demands and claims to date, and C. Fowler is to finish the Keokuk matter in which Mr. Frank is partner.

And on November 22, 1906, they executed an article of agreement for a warranty deed of said land ^{by} Funk to Fowler, reciting therein that Funk ^{held} the land in trust for Fowler, and agreed to convey to him upon Fowler's assuming the mortgage on the same and paying Funk all sums of money that he ~~has~~ paid out for Fowler and become obligated to pay for him, with interest at 5%; and providing that Fowler ^{shall} have the use of the land in consideration of paying all taxes thereon, and the interest on the mortgage debt, and the interest to Funk on all sums that he has been compelled to advance for Fowler, and the interest on all obligations which Funk has become surety for or ~~may hereafter~~ become surety for or obligated to pay for Fowler.

Fowler kept possession of the land, excepting a small part thereof that was conveyed by Funk, till February 1911; but defaulted on some of his obligations imposed by the contract; and Funk conveyed the land to his son-in-law, who got possession of it; whereupon Fowler begun a forcible detainer suit before a Justice of the Peace to recover possession. The son-in-law reconveyed to Funk and he filed a bill in equity to enjoin the forceable detainer proceedings and praying for a cancellation of the contract of November 24, 1906; and ^{that} the deed be declared an absolute conveyance; of if it should be held that Fowler had an equity of redemption that the Court fix the amount to be paid within a short day to be named.

The theory of the bill ^{was} that the deed was an absolute conveyance; that the subsequent contract was intended and should be construed the same as though Funk's title had no connection with Fowler; that the recital in the contract that Funk held the land in trust for Fowler was inserted by Fowler without Funk's knowledge; that the relation of at-

And on November 28, 1906, they executed an article of agreement for a warranty deed of said land by Funk to Fowler, reciting therein that Funk held the land in trust for Fowler and agreed to convey to him upon Fowler's assenting to pay for him out of the money and paying Funk all sums of money that he was obligated to pay for him, and providing that Fowler shall have the use of the land in consideration of paying all taxes thereon and the interest on the mortgage debt and the interest to Funk on all sums that he has been compelled to advance for Fowler, and the interest on all obligations which Funk has become surety for or may hereafter become surety for or obligated to pay for Fowler.

Fowler sent possession of the land, excepting a small part thereof that was conveyed by Funk, till February 1911, but defaulted on some of his obligations imposed by the contract; and Funk conveyed the land to his non-in-law who obtained possession of it; whereupon Fowler began a forcible detainer suit before a Justice of the Peace to recover possession of the non-in-law conveyed to Funk and he filed a bill in equity to enjoin the forcible detainer proceedings and try the for a cancellation of the contract of November 24, 1906, and that the land be declared an absolute conveyance; it is now on appeal from the Justice of the Peace and the equity of redemption. That the Court fix the amount to be paid within a short day to be needed.

The theory of the bill is that the deed was an absolute conveyance; that the agreement contract was intended and should be construed the same as though Funk's title had no connection with Fowler; that the recital in the contract that Funk held the land in trust for Fowler was inserted by Fowler without Funk's knowledge; that the relation of ot-

torney and client existed between the parties and Funk therefore reposed confidence in Fowler and signed papers prepared by him without question; and that the contract was not binding on Funk if it contained anything indicating that the title was not in him absolutely. That Fowler had defaulted in performing obligations imposed on him by the agreement, and that a reasonable time for a conveyance thereunder to be demanded by Fowler had elapsed, and for that reason he had no further interest in the land. Fowler answered, claiming that the whole transaction was an attempt to give Funk security, in the nature of a mortgage, on the land in question; and that the article of agreement of November 22, 1906, was well understood by Funk when it was executed and was in fact the written expression of the oral agreement and understanding between them when the quit claim deed was executed. He also filed a cross bill praying an accounting and reconveyance upon payment of the amount so to be found due.

A temporary injunction was granted on the original bill and a motion to dissolve it denied, and an appeal prosecuted by Fowler to this court. We affirmed the orders of the trial court granting and refusing to dissolve the injunction, ^{was of course} on the ground that, ^{as the case was presented,} ~~the only~~ ^{the only} question before this court was whether the bill on its face was sufficient to warrant the issuing of the writ, and we held it was, if assumed to be true, sufficient. (Funk v Fowler 179 Ill. App. 356.)

The cause was referred to the master in chancery to take evidence and report the same and his findings of facts and conclusions of law thereon. He reported finding the allegations of the original bill true, and the equities with the complainant therein, and recommended a decree which was entered

and understanding between them than the first claim deed was executed. He also filed a cross bill praying an accounting and conveyance upon payment of the amount so to be found and was in fact the writer of the bill. The bill was filed in 1908, was well understood by Funk when it was executed and was in fact the written expression of the bill agreement and the article of agreement of November 1907, in the nature of a mortgage, on the land in Funk security, that the whole transaction was an attempt to give reason he had no further interest in the land. Fowler testified under to be deceived by Fowler. His elapsed, and for that agreement, and that a reasonable time for conveyance there- submitted in testimony of witnesses imposed claim by the fact that title was not in him absolutely. That Fowler had no standing on Funk if it contained anything interesting referred by him without question; and that he conducted the transaction exposed to Fowler and it was not a- formerly and client asked between the parties and Funk.

finding the deed absolute and Fowler still indebted to Funk in the sum of \$5760.02; making the temporary injunction perpetual; and dismissing the cross bill for want of equity; ordering Fowler to pay Funk said sum of \$5760.02 and in case of default that Funk have execution therefor, and further ordering that Fowler pay the taxable costs of the suit. From which decree this writ of error is prosecuted; the ~~principal question presented here being whether the court erred in finding the quit claim deed an absolute conveyance and not in the nature of a mortgage.~~

We are unable to concur in the finding of the Master and the Chancellor that the quit claim deed in question was intended as an absolute conveyance. The facts can hardly be said to be in dispute. The whole history of the transaction including the testimony of Funk himself, when his direct and cross examination is read together, seems to us opposed to any claim that at the time the deed was delivered either party believed or understood that Fowler had not the right to discharge his obligations to Funk and thus redeem the land.

It follows that the accounting should have been on that basis, and a decree should have been entered permitting Fowler to redeem within a time fixed therein, upon the satisfaction of the obligations for which the security was given. A recasting of the account as stated is required. It now includes rent of the premises and other items that would be differently treated on an accounting as the basis of redemption. The items of the account are numerous and are not sufficiently pointed out or discussed in the briefs to enable us to give specific directions as to the treatment of many of them. It appears that a small portion of the land was conveyed by Funk and that he received the money therefor. If this sale was acquiesced in by Fowler, or if it was

finding the deed absolute and Fowler still indebted to Lusk in the sum of \$250.00, making the temporary injunction permanent, and ordering the cross bill for want of equity; ordering Fowler to pay Lusk said sum of \$250.00 and in case of default that Lusk have execution therefor, and further ordering that Fowler pay the taxable costs of the suit. From which appears this writ of error is prosecuted; the principal question presented here being whether the court erred in finding the plaintiff owned an absolute conveyance and not in the nature of a mortgage.

We are unable to concur in the finding of the Master and the Chancellor that the plaintiff claim deed in question was intended as an absolute conveyance. The facts can hardly be said to be in dispute. The whole history of the transaction including the testimony of Lusk himself, and his credit and cross examination is read together, seems to us opposed to any claim that at the time the deed was delivered either party believed or understood that Fowler had not the right to discharge his obligations to Lusk and thus redeem the land. It follows that the accounting should have been on that basis, and a decree should have been entered compelling Fowler to redeem within a time fixed therein, upon the satisfaction of the obligations for which the security was given. A recasting of the account as stated is required. It now includes part of the premises and other things that would be differently treated on an accounting as the basis of adjustment. The items of the account are numerous and are not suitably pointed out or discussed in the briefs to enable us to give specific directions as to the treatment of any of them. It appears that a small portion of the land was conveyed by Lusk and that he received the money therefor. In this case we recommended in by Fowler, or if it was

not and the price received was not unreasonably low, Funk should only be charged with the amount he received at the date when he received it. There is a controversy over the charges of Fowler to Funk for legal services. in Our opinion the Master correctly found and reported that item. As to all other items there should be a re-reference to the Master to re-state the account on such evidence as the record already contains, and such further evidence as the parties or either of them may produce. The temporary injunction should remain in force till the satisfaction of the decree to be rendered.

The decree is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

not and the price received was not unreasonably low, Rank should only be charged with the amount he received at the date when he received it. There is a controversy over the charges of Fowler to Rank for legal services. In 1940 opinion the Master correctly found and reported that item. As to all other items there should be a reversal to the Master to re-state the account on such evidence as the record already contains, and such further evidence as the parties or either of them may produce. The temporary injunction should remain in force till the satisfaction of the decree to be rendered.

The decree is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 189

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6086

Adam Nebergall, Admr. appellee

vs

Appeal from LaSalle.

The Prudential Insurance Co.

of America. appellant.

Carnes, P. J.

Action

~~This is a suit in assumpsit brought by the appellant~~
Adam Nebergall, as administrator of the estate of his son
Edward L. Nebergall, deceased, against the Prudential Insurance
Co. of America, the appellant, on a policy issued on the life
of the deceased. A jury trial resulted in a judgment against
appellant for the full amount of the policy and interest
thereon, \$284.08, from which ^{the defendant} ~~judgment~~ this appeal is taken.

~~There was a stipulation that all evidence might
be introduced by each party that would be competent under
any proper pleading. It is claimed by appellant that the
court erred in admission and rejection of evidence, and in
giving and refusing instructions; but said that no contro-
versy is raised as to the right of plaintiff to sue, and
that the real question seems to be one of fact.~~

^{which}
The policy was issued at Ottawa, Illinois, where
the insured resided with his parents, April 10, 1905, when
he was sixteen years of age, ^{and} ~~it~~ provided for the payment of
a weekly premium of fifteen cents; and that it should be
void in case of default of payment of premiums when due,
except, that if the premium was not called for by a repre-
sentative of the Company, ^{the} insured might send it to the
Company before it should be in arrears four weeks; and in
case of lapse for non-payment of premiums the policy might
be revived within one year from date to which premiums had
been paid upon payment of arrears and showing present in-

Gen. No. 6036

Adam Nebeski, Adm. Appellee

vs

The Prudential Insurance Co.

of America, Appellant.

Circuit, P. 1.

This is a writ of habeas corpus brought by the appellant

Adam Nebeski as administrator of the estate of his son Edward L. Nebeski deceased, against the Prudential Insurance Co. of America, the appellant, on a policy issued on the life of the deceased. A jury trial resulted in a judgment against

the appellant for the full amount of the policy and interest thereon, \$384.03, from which the appellant is entitled

There was stipulation that all evidence might

be introduced by each party that would be competent under any proper pleading. It is claimed by appellant that the court erred in admission and rejection of evidence, and in giving and refusing instructions; but said that no controversy is raised as to the right of plaintiff to sue, and that the real question seems to be one of fact.

The policy was issued at Ottawa, Illinois, where

the insured resided with his parents, April 10, 1905, when he was sixteen years of age; it provided for the payment of a weekly premium of fifteen cents; and that it should be void in case of default of payment of premiums when due, except that if the premium was not called for by a representative of the company, insured might send it to the

company before it should be in arrears four weeks; and in case of lapse for non-payment of premiums the policy might be revived within one year from date to which premiums had been paid upon payment of arrears and showing present in-

surability of insured. Other~~wise~~ all rights under the policy were forfeited in case of non payment of premiums when due. The insured died as the result of an accident about two o' clock in the morning of April 11, 1911, while absent from Ottawa. His weekly premium due February 20, 1911, was paid March 15, 1911, and there was no subsequent payment until the day of his death, when one of ^{his} ~~the~~ brothers, ~~of insured~~ after hearing of the accident, but not of the death, went to the office of the company and paid \$1.35, which was received by one Donovan, who gave a receipt for the same, reciting that the premium would again fall due April 17, 1911. The Company afterwards returned thirty five cents of this money and used \$1.00 of it to pay for a certified copy of the record of the Coroner's Inquest. ~~Some question is made whether Donovan was at the time an agent of the Company, but we think the proof made a prima facie showing that he was, and it was not rebutted.~~ Proofs of death were made and the company refused to pay on the ground that the policy was not in force at the time of the death; ^{as} ~~that~~ it had lapsed and been forfeited.

^{The company admitted}
~~Appellant admits~~, that if ^{it} the practice of the Company and its course of dealings with the insured, and others known to the insured, has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event, ^{would} ~~will~~ not be insisted on, ^{that} the Company ~~will~~ ^{would} not be allowed to set up such forfeiture as against one in whom its conduct has induced such belief. ~~This doctrine is discussed and authorities cited and reviewed by this court in United States Indemnity Society v Griggs 118 Ill. App. 577, and by the Appellate Court for the Third District in North American Accident Insurance Company v Whiteside, 134 Ill. App. 390; and is no doubt the law. But appellant~~

liability of insured. Otherwise all rights under the policy
 were forfeited in case of non payment of premiums when due.
 The insured died as the result of an accident about two o'
 clock in the morning of April 11, 1911, while passing from
 Ottawa. His weekly premium due February 20, 1911 was paid
 March 15, 1911, and there was no subsequent payment until the
 day of his death, when one of the promoters of insured after
 hearing of the accident, but not of the death, went to the
 office of the company and paid \$1.35 which was received by
 one Donovan, who gave a receipt for the same, reciting
 that the premium would again fall due April 15, 1911. The
 company afterwards returned thirty five cents of this
 money and used \$1.00 of it to pay for a certified copy of
 the record of the coroner's inquest. For a question is made
 whether Donovan was at the time an agent of the company,
 but we think the proof is a prima facie showing that he
 was, and it was not rebutted. Proofs of death were made
 and the company refused to pay on the ground that the policy
 was not in force at the time of the death, as it had
 lapsed and been forfeited.
 The company insists that if the practice of the company
 and its course of dealings with the insured, and others known
 to the insured, has been such as to induce a belief that
 so much of the contract as provides for forfeiture in a
 certain event, will not be insisted on, the company will
 not be allowed to set up such forfeiture as against one in
 whom its conduct has induced such belief. This doctrine is
 discussed and authorities cited and reviewed by this court
 in United States Fidelity Society v. Galt, 118 Ill. App.
 572, and by the Appellate Court for the Third District in
 Western American Accident Insurance Company v. Whitehead, 35
 Ill. App. 280; and is no doubt the law. But defendant

~~argues that deceased did not know of any course of dealing~~
~~by the Company that could create a belief that the time of~~
~~payment of premiums had been waived. Appellee introduced~~
~~evidence,~~ ^{The plaintiff should} that a number of times during the life of the
 policy, premiums had been received by the company when ~~more,~~
~~and some of them much more, than four weeks overdue; and the~~
~~policy had been kept in force by the payment of such overdue~~
~~premiums~~ without the insured complying with the provision
 for re-instatement of members whose policies lapsed by non-
 payment of dues. ~~It appeared that insured had been absent~~
 from ^{his} home much of the time since the policy was issued; and ^{that}
 premiums had been paid by his father or some other member
 of the family. ^{The plaintiff also} Appellee also produced witnesses to prove
 the course of dealings of ^{the insured} ~~appellant~~ with other members of
 the family of the insured; ~~and after objections sustained to~~
~~questions asked in reference thereto, he offered to prove~~
 that there were nine children in the Nebergall family; that
 they and their father carried policies in the defendant com-
 pany and that payment of premiums on such policies had,
 before the death of the insured, been accepted on various
 and different occasions, ^{where} ~~that were in arrears for periods~~
~~of from five to thirteen weeks,~~ ^{in arrears,} without declaring a forfeit-
 ure, and that this practice was known to the insured; ~~which~~
~~evidence was objected to by appellant as incompetent, and~~
~~the objection sustained. This evidence seems competent~~
~~under the above rule; and it seems to us also that the father~~
~~and other members of the family being intrusted with the pay-~~
~~ment of premiums on this policy while the insured was absent~~
~~from home, which as we have said was much of the time, were~~
~~acting as his agents in so paying premiums, and that it was~~
~~material and important, on this question of waiver by the~~
~~company, if the agent of the insured was led to believe~~
~~that the time of payment of premiums would be waived by~~

agrees that deceased did not know of any course of dealing
 by the Company that could create a belief that the life of
 payment of premiums had been waived. A letter introduced
 evidence, that a number of times during the life of the
 policy, premiums had been received by the company and the
 policy had been kept in force by the payment of such over-
 payments without the insured complying with the provision
 for reinstatement of members whose policies lapsed by non-
 payment of dues. It appeared that the policy was issued, and
 from some much of the time since the policy was issued, and
 premiums had been paid by his father or some other member
 of the family. Appellants also produced witnesses to prove
 the course of dealing of appellant with other members of
 the family of the insured; and after objections sustained to
 questions asked in reference thereto, he offered to prove
 that there were nine children in the Federal family; that
 they and their father carried policies in the defendant com-
 pany and that payment of premiums on such policies had,
 before the death of the insured, been accepted on various
 and different occasions, that were in various law periods
 of from five to thirteen weeks without requiring a formal
 use, and that this practice was known to the insured; where
 evidence as objected to by appellant is incompetent, and
 the objection sustained. This evidence was competent
 under the rules; and it was also that the father
 and other members of the family held policies with the com-
 pany and that payment of premiums on this policy while the insured was absent
 from home, that as he had said was much of the time, were
 action as the agent in so paying premiums, and that it was
 material and important, on this question of waiver by the
 company, if the agent of the insured was led to believe

appellant. A party cannot be heard to object that a fact was not proved where the proof was prevented by his objection. *Hahl v Brooks*, 313 Ill. 134; *C. & A. R. R. Co. v Walker*, 118 Ill. App. 397; *American Insurance Company v Meyers*, 118 Ill. App. 484; *Rock Island County v Rankin*, 118 Ill. App. 499.

The evidence admitted and offered was sufficient to prevent the court from disturbing a verdict resting on the finding that the provision of the policy as to time of payment had been waived by the Company. If the agent receiving past due premiums lacked authority to waive the provision in the policy, as appellant suggests, still it must be held from a course of dealing in receiving past due premiums that the company knew of and ratified the act of the agent.

Appellant received the last payment after the death of assured, and it is true that it did not by so doing revive the policy if it was before that time forfeited; and the court so instructed the jury. But the fact that the agent without knowledge of the death of the insured received and receipted for the overdue premiums, tends to show that he did not regard the policy then forfeited for non-payment of premiums; and if it be said that he had no authority to waive a provision of the policy and therefore it is immaterial what he supposed, still the receipt and return of the premium was a part of the history of the transaction, and we do not think the court erred in admitting the evidence in reference thereto or in refusing to instruct the jury to disregard it.

We find no error prejudicial to appellant in the admission or exclusion of evidence. Neither do we find what we regard reversible error in giving instructions for

Appellant. A party cannot be heard to object that a fact was not proved where the proof was prevented by his objection. *Hahl v Brooks*, 313 Ill. 134; *C. & A. R. Co. v Walker*, 118 Ill. App. 387; *American Insurance Company v New York*, 118 Ill. App. 484; *Rock Island County v Rankin*, 118 Ill. App. 498.

The evidence admitted and offered was sufficient to prevent the court from stating a verdict resting on the finding that the provision of the policy as to time of payment had been waived by the Company. If the agent receiving past due premiums lacked authority to waive the provision in the policy, as appellant suggests, still it must be held from a course of dealing in receiving past due premiums that the company knew of and ratified the act of the agent.

Appellant received the first payment after the death of assured, and it is true that it did not by so doing revive the policy if it was before that time forfeited; and the court so instructed the jury. But the fact that the agent without knowledge of the death of the insured received and receipted for the overdue premiums, tends to show that he did not regard the policy then forfeited for non-payment of premiums; and it is so said that he had no authority to waive a provision of the policy and therefore it is immaterial what he supposed, at the receipt and return of the premium was a part of the history of the transaction, and we do not think the court erred in admitting the evidence in reference thereto or in instructing the jury to disregard it.

Nothing is error prejudicial to appellant in the admission or exclusion of evidence. Neither do we find that we regard reversible error in giving instructions for

~~appellee or refusing instructions offered by appellant. The principal question of fact for the jury to determine was as to receipt of past due premiums by appellant, and in so far as that question was in dispute the burden was on appellee to prove that they had been accepted without declaring a forfeiture of the policy. Appellant offered several instructions directing a verdict if the uncontroverted facts were found by the jury, ignoring the question of waiver, which the court properly refused. It also offered an instruction as follows:~~

The following instruction

"The court instructs the jury that the burden of proof to show that the policy introduced in evidence was in force at the time of the death of said Edward L. Nebergall, is on the plaintiff and he must prove that such policy was in force by the preponderance or greater weight of evidence."

~~which the court refused. This instruction was not well calculated to advise a jury clearly on what questions of fact the burden of proof was on the plaintiff, and may be criticised as confusing questions of law and fact; but in view of the language used in other instructions it should have been given, yet under the proof as to controverted facts we do not regard its refusal as reversible error. Finding no reversible error in the record the judgment is affirmed.~~

Affirmed.

[illegible]

1001127A

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 224

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6050.

Anthony O'Grady, appellee

vs

Appeal from Will.

Chicago & Joliet Electric

Railway Company, appellant.

Carnes, P. J.

✓ Appellant, Chicago & Joliet Electric Railway

Company, operates a street car line extending westerly from the business portion of Joliet to and beyond the city limits. It is on McDonough street where it crosses Raynor avenue at about right angles near the outskirts of the city; and there is a turnout or passing track 365 feet long, constructed in the usual manner, extending each way from Raynor avenue. In passing, the cars turn to the right, west bound cars using the north track and east bound cars the south track. The cars stop at the far side of the street to receive and discharge passengers; a west bound car would, under the practice stop at the west side of Raynor avenue for that purpose. Appellee, Anthony O'Grady, a man about 78 years old was in the evening of May 26, 1912, a passenger on a car going west on McDonough street, and wished to alight at Raynor avenue, and so informed the conductor. Appellee claims that the car did not stop at Raynor avenue, but did stop about 150 feet west of the avenue, and that he got off the car there, which was on the north track, and went around the east end of the car towards the south, and in doing so got on to the south track and was struck by an east bound car that was running without signal or warning, and dragged back the whole distance of the avenue, about 150 feet, and received injuries to his face, causing profuse ~~xxx~~ bleeding, and to his clothing. Appellant admits the request

Gen. No. 8080.
Anthony O'Grady, appellee
vs
Chicago & Joliet Electric
Railway Company, appellant.
Chicago, Ill.
Appeal from Ill.
Circuit Court, P. 2.
✓ Appellant, Chicago & Joliet Electric Railway
Company, operates a street car line extending westerly
from the business portion of Joliet to and beyond the city
limits. It is on McDonough street where it crosses Raynor
avenue at about right angles near the outskirts of the city;
and there is a turnout or passing track 365 feet long, con-
structed in the usual manner, extending each way from Raynor
avenue. In passing, the cars turn to the right, west bound
cars using the north track and east bound cars the south
track. The cars stop at the far side of the street to re-
ceive and discharge passengers; a west bound car would, under
the practice stop at the west side of Raynor avenue for that
purpose. Appellee, Anthony O'Grady, a man about 78 years old
was in the evening of May 28, 1912, a passenger on a car
going west on McDonough street, and started to alight at
Raynor avenue, and so informed the conductor. Appellee
testifies that the car did not stop at Raynor avenue, but did
stop about 150 feet west of the avenue, and that he got off
the car there, which was on the north track, and went around
the east end of the car towards the south, and in doing so
got on to the south track and was struck by an east bound
car that was running without signal or warning, and
suffered back the whole distance of the avenue, about 150 feet,
and received injuries to his face, causing profuse hae-
morrhaging, and to his clothing. Appellant admits the request

to stop at the avenue, and that appellee was injured, but claims that the conductor before reaching the avenue gave the signal, one bell, that would warn the motorman to stop at the far side of the avenue; that appellee came out and stood on the back platform with him and a passenger named Calkins, and when the car was within 50 to 75 feet of the east line of the avenue, and running four to six miles an hour, appellee got off and fell upon the street in so doing; that the conductor then gave the emergency stop signal, three bells and the car was stopped at the east line of the avenue; that there was another car, east bound, standing still at the time on the south track near the west end of the passing track, about 75 feet west of the avenue. ✓

This action was brought to recover for that injury and resulted in a verdict and judgment of \$545.00 for the plaintiff; there had been a former trial resulting in a verdict of \$500 and anew trial granted by the court, because, as counsel both say, the court was of the opinion that the evidence did not sustain the verdict. The question presented here is whether the evidence sustains the verdict. The arguments are mostly directed to that question, and it is the only one we need consider. If the accident occurred in the manner claimed by appellee the judgment should be affirmed; there is no question about the amount of damages and no other question in the case that should prevent a recovery if the facts are established. On the other hand if the facts are as claimed by defendant there is no contention, and no room for contention, that the judgment should stand. ✓

✓ Appellee testified in his own behalf and narrated the facts as we have above said he claims them to be. He called as a witness Mabel Palmer, a young lady who was walking west

to stop at the avenue, and that Applebee was injured, but
also that the conductor before reaching the avenue gave
the signal, one bell, that would turn the car around to stop
at the far side of the avenue; that Applebee came out and
stood on the back platform with him and a passenger named
Calkins, and when the car was within 50 to 75 feet of the
east line of the avenue, and running four to six miles an
hour, Applebee got off and fell upon the street in so doing;
that the conductor then gave the emergency stop signal,
three bells, and the car was stopped at the east line of the
avenue; that there was another car, east bound, standing
still at the time on the south track near the east end of
the crossing track, about 75 feet east of the avenue.
This action was brought to recover for that injury and
resulted in a verdict and judgment of \$545.00 for the
plaintiff; there had been a former trial resulting in a
verdict of \$500 and new trial granted by the court, because
the counsel both say, the court was of the opinion that the
evidence did not sustain the verdict. The question presented
was whether the evidence sustains the verdict. The
arguments are mostly directed to that position, and it is
the only one we need consider. If the verdict is sustained
in the manner claimed by Applebee the judgment should be
affirmed; there is no question about the amount of damages
and no other question in the case that should prevent a
recovery in the facts are undisputed. On the other hand
if the facts are as claimed by defendant there is no conten-
tion, and no room for contention, that the judgment should

Applebee testified in his own behalf and narrated the
facts as he gave above and he claims them to be. He called

on McDonough street with a gentleman. She had come on to McDonough street from the next street east from Raynor Avenue and says as she approached Raynor Avenue she saw two cars standing on McDonough street, one just east of the avenue and the other about half a block west of the avenue; She saw a number of people near the east end of the avenue and on reaching the place saw appellee with his face bleeding and people brushing off his clothes. She lived on Raynor avenue south of McDonough street and appellee lived on Raynor avenue a short distance south of her home; she and the gentleman accompanying her walked with appellee as far as her home and then he went on to his home unattended. She is quite sure that the car she speaks of, near which appellee was; east of the avenue, was on the south track, which tends to corroborate appellee, for if it was the west bound car, as appellants claim, it was on the north track; but by way of impeaching her testimony it was proven by the court reporter that took her testimony at the former trial that she then said that she did not notice which track that car was on. This is all the testimony introduced by appellee showing or tending to show that he was struck by an east bound car and dragged back to the avenue.

Appellants introduced as witnesses the conductor and motorman of the car on which appellee was riding, and the passenger Calkins who was on the back platform of that car; the conductor and Calkins both testify that appellee stepped off the car while it was running and before it reached Raynor avenue and fell in so doing; the motorman testified that he first got the one bell signal, before reaching the avenue, which meant that he was to stop on the far side of the avenue; that before he reached the avenue he got the three bell signal, which meant stop at once, that he succeeded in stopping

on McDonough street with ... and came on to McDonough street from the next street east ... Avenue and says as she approached Raynor Avenue she saw a car standing on McDonough street, one just east of the avenue and the other about half a block west of the avenue; she saw a number of people near the east end of the avenue and on reaching the place saw appellee with his two leading and people running off his clothes. She lived on Raynor Avenue south of McDonough street and appellee lived on Raynor Avenue a short distance south of her home; she and the gentleman accompanying her walked with appellee as far as her home and then he went on to his home unattended. She is quite sure that the car was a species of, near which appellee was; east of the avenue, was on the south track, which tends to corroborate appellee, for if it was the west bound car, as appellee claims, it was on the north track; but by way of impeaching her testimony it was proven by the court reporter that took her testimony at the former trial that she then said that she did not notice which track that car was on. This is all the testimony introduced by appellee showing tending to show that he was struck by an east bound car and drove back to the avenue.

Appellee introduced as witnesses the conductor and motorman of the car on which appellee was riding, and the passenger Galkins who was on the back platform of that car; the conductor and Galkins both testify that appellee stepped off the car while it was moving and before it reached Raynor Avenue and fell in no way; the motorman testified that he first got the one bell signal, before reaching the avenue, which meant that he was to stop on the far side of the avenue; that before he reached the avenue he got the three bell signal, which meant stop at once, that he succeeded in stopping

with the front end of his car about even with the east line of the avenue, that he went back and saw the conductor raising appellee from the ground. The conductor and motorman of the car standing west of the avenue testify that their car was on the south track about 75 feet west of the avenue waiting for the other car to pass, the conductor went to the west bound car which was standing just east of the avenue and found appellee there with ~~xxx~~these people around him; they both say their car struck no one and injured no one. Two or three of these witnesses say that appellee said he was an old railroad man and thought he could get off, which statement he denies. ✓

It is idle to discuss the reconciliation of the testimony of these five witnesses produced by appellant with the testimony of appellee; Mable Palmer's testimony is all consistent with the theory of appellant except her statement that the car was standing on the south track, and that statement may be disposed of by presuming that she did not take particular notice which track it was on, as she said she did not on the former trial. Very little weight can be given her testimony as a corroboration of appellee's testimony.

We have practically the question whether appellee shall be permitted to maintain a judgment that is based on a verdict supported by his own testimony contradicted by the testimony of five apparently credible witnesses. It is true that four of these witnesses may be said to be biased and prejudiced because of their relation to the matter in dispute, and their desire to protect themselves from blame and censure; but appellee is certainly as much open to the suspicion of bias and self interest that might influence his testimony as is any one of these four witnesses; and as to the fifth witness for the defendant, Calkins, there seems no motive

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with the front end of his car about even with the east line
of the avenue, that he next took and saw the conductor
raising upbesee from the ground. The conductor and
motorman of the car standing west of the avenue testily that
their car was on the south track about 75 feet east of the
avenue waiting for the other car to pass, the conductor went
to the west bound car which was standing just east of the
avenue and found upbesee there with unknown people around
him; they both say their car struck no one and injured no
one. Two or three of these witnesses say that upbesee said
he was an old railroad man and thought he could get off,
which statement he denies.

It is idle to discuss the reconciliation of the tes-
timony of these five witnesses produced by upbesee with
the testimony of upbesee; Noble Palmer's testimony is all
consistent with the theory of upbesee except her statement
that the car was standing on the south track, and that state-
ment may be disposed of by assuming that she did not take
particular notice which track it was on, as she said she
did not on the other trial. Very little weight can be given
her testimony as a corroboration of upbesee's testimony.

We have practically no question whether upbesee shall be
permitted to maintain a judgment that is based on a verdict
supported by his own testimony contradicted by the testimony
of five apparently credible witnesses. It is true that four
of these witnesses may be said to be biased and prejudiced
because of their relation to the matter in dispute, and
their desire to protect themselves from blame and censure;
but upbesee is certainly as much open to the suspicion of
bias and self interest that might influence his testimony
as is any one of these four witnesses; and as to the fifth
witness for the defendant, Glikin, there seems no motive

whatever for him to misstate the facts or color his testimony. It is sometimes said that the testimony of one witness should not be permitted by a court to outweigh the testimony of many witnesses, in the absence of some consideration of probability to support the testimony of the one witness. It seems to us that instead of appellee's testimony being supported by reasonable presumptions of what the facts might naturally be, that the situation is just the reverse, and that it is much more reasonable to assume that the accident happened as appellant's witnesses say it did.

We are of the opinion that no consideration of the fact that the jury saw the witnesses and heard them testify, and such consideration is of much weight, should permit this verdict to stand. The trial court had no authority to weigh the evidence, and therefore did not err in refusing to direct a verdict for the defendant; but it is our duty to weigh the evidence and in our opinion its weight is so manifestly against the verdict that the judgment must be reversed. As there has been two jury trials and nothing in the record indicates that the evidence could or would be substantially different on another trial we do not remand the case.

Reversed.

Finding of Facts.

We find that the defendant Chicago & Joliet Railway Company, was guilty of no negligence causing or contributing to the injury complained of, and that the plaintiff was not in the exercise of due care for his own safety at the time and place in question.

whatever for him to mistake the facts or color his testimony. It is sometimes said that the testimony of one witness should not be permitted by a court to outweigh the testimony of many witnesses, in the absence of some consideration of probability to support the testimony of the one witness. It seems to me that instead of appellee's testimony being supported by reasonable presumptions, of what the facts might naturally be, that the attraction is just the reverse, and that it is much more reasonable to assume that the accident happened as appellee's witnesses say it did.

We are of the opinion that no consideration of the fact that the jury saw the witnesses and heard them testify, and such consideration is of much weight, should permit this verdict to stand. The trial court had no authority to weigh the evidence, and therefore did not err in refusing to direct a verdict for the defendant; but it is our duty to weigh the evidence and in our opinion its weight is so manifestly against the verdict that the judgment must be reversed. As there has been two jury trials and nothing in the record indicates that the evidence could or would be substantially different on another trial we do not remand the case. Reversed.

Finding of Facts. We find that the defendant Chicago & Joliet Railway Company, was guilty of no negligence causing or contributing to the injury complained of, and that the plaintiff was not in the exercise of due care for his own safety at the time and place in question.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

5979

600

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

✓Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 227

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5979

A. Silver, Plaintiff in error.

~~vs~~

Error to Boone.

Chicago and Northwestern Railway Company.

Defendant in error.

Dibell, J.

for the destruction
The plaintiff was the lessee of sheds ^{on a} at the south west corner of Main and Meadow Streets in the city of Belvidere, in which he had stored rubber, rags, paper, scales machinery and other articles, called "junk". Meadow Street ^{on which the} runs east and west and defendant railroad company ^{maintains} had switch tracks ^{of the switches should be at} running ~~also~~ along said street. In the afternoon of April 13, 1913, the sheds caught fire and plaintiffs property was injured thereby. Plaintiff sued the railroad company to recover for the loss occasioned by the fire. He introduced proof that a switch engine passed back and forth ^{on the} Meadow Street within a few feet of his property, ^(shortly) time before the fire broke out, ~~and that it was~~ hauling or pushing some freight cars, and that it labored heavily, and ^{its} that the wheels of the engine slipped; and that it threw sparks ^{from the} upon the roof of these sheds and set them afire. Defendant introduced proof that, in doing its switching ^{on the} that afternoon, ^{in question} this engine did not go ^{near the plaintiff's sheds} west of Main Street, which was on the east side of these sheds, and that a gale of wind was blowing from a southerly direction, ^{with a following south} and that nothing escaping from the engine could have been carried upon this property, and also that the engine was properly equipped and was operated by a competent engineer. There was a verdict and a judgment for the defendant. Plaintiff prosecutes this writ of error to review said judgment.

The act of 1869 in relation to fires caused by

J. Silver, Plaintiff in Error.

Barber to Boone.

vs.

Chicago and Northwestern Railway Company.

Defendant in Error.

Daniel, J.

The plaintiff was the lessee of sheds at the south-west corner of Main and Meadow Streets in the city of Belvidere, in which he had stored rubber, tugs, paper, scales, machinery and other articles, called "junk". Meadow Street runs east and west and defendant railroad company has switch tracks running along said street. In the afternoon of April 13, 1913, the sheds caught fire and plaintiff's property was injured thereby. Plaintiff sued the railroad company to recover for the loss occasioned by the fire. He introduced proof that a switch engine passed back and forth on Meadow Street within a few feet of his property a short time before the fire broke out, and that it was hauling or pushing some freight cars, and that it labored heavily, and that the wheels of the engine slipped, and that it threw sparks upon the roof of these sheds and set them afire. Defendant introduced proof that, in doing its switching that afternoon, this engine did not go west of Main Street, which was on the east side of these sheds, and that a gale of wind was blowing from a southerly direction and that nothing escaping from the engine could have been carried upon the property, and also that the engine was properly equipped and was operated by a competent engineer. There was a verdict and judgment for the defendant. Plaintiff procures this writ of error to review said judgment.

The act of 1889 in relation to fires caused by

locomotives (Hurd's R. S. 1913, p. 1958 #103.) provides that in actions like this for the recovery of damages on account of injury caused by fire communicated by any locomotive engine while passing along any railroad, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge with negligence the corporation using the railroad. In Chicago & Alton Railroad Company v Quintana, 58 Ill. 389, it was said that the effect of this statute is, "if the fact be established that an injury has been occasioned from fire sparks emitted from the engine while passing along the road, to make that fact itself full prima facie evidence of negligence on the part of the company, and of its agents and servants in charge at the time. If the party injured establishes, in the first instance the fact that the fire, which occasioned the injury complained of, was communicated from the engine, such proof would entitle the party to a recovery, and the burden of proof to rebut the prima facie case thus made, is on the company to show by affirmative evidence that the engine at the time was equipped with the necessary and most effective appliances to prevent the escape of fire, and that the engine was in good repair, and was properly, carefully and skillfully handled by a competent engineer." That decision has been followed many times since and, if there is in any case since then any language not in exact harmony therewith, it will be found that the meaning of the statute was not squarely presented. In this state of the law, and with the contradictory proof above stated, the court gave the sixth instruction, requested by defendant, which placed upon plaintiff the burden of proving, not only that defendant set the fire, but also that either the engine was not in a reasonably safe condition, or that it was not managed with reasonable

locomotives (Harris R. 2, 1915, p. 1358 "103") and that
 in fact this for the recovery of damages on account
 of injury caused by fire so mounted by any locomotive
 engine while passing along any railroad, the fact that
 such fire was so communicated shall be taken as full prima
 facie evidence to charge with negligence the corporation
 using the railroad. In Chicago & Alton Railroad Company v
 Guastana, 28 Ill. 389, it was said that the effect of this
 statute is, "if the fact be established that an injury has
 been occasioned from fire sparks emitted from the engine
 while passing along the road, to make that fact itself
 full prima facie evidence of negligence on the part of the
 company, and of its agents and servants in charge of the
 fire. If the party injured establishes, in any instance,
 the fact that the fire, which occasioned the injury complained
 of, was communicated from the engine, such proof would
 entitle the party to a recovery, and the burden of proof to
 rebut the prima facie case thus made, is on the company
 to show by affirmative evidence that the engine at the time
 was equipped with the necessary and most effective appliances
 to prevent the escape of fire, and that the engine was
 in good repair, and was properly, carefully and skillfully
 handled by a competent engineer." That decision has been
 followed many times since and, if there is any case since
 then any language not in exact harmony therewith, it will
 be found that the meaning of the statute was not adversely
 presented. In this state of the law, and with the contra-
 dictory proof above stated, the court gave the sixth in-
 struction, requested by defendant, which placed upon plain-
 tiff the burden of proving, not only that defendant set the
 fire, but also that either the engine was not in a reasonably
 safe condition, or that it was not managed with reasonable

~~care and skill. This deprived plaintiff of the benefit of the statute, and was exactly contrary to the law governing the case. The court also gave the twelfth instruction requested by defendant, which told the jury that there was no proof that the engine was not furnished with the most approved appliances for arresting sparks, and no proof that the engine and its appliances were not in good repair and no proof that the engine was not handled by a competent engineer. In fact there was proof that this engine ^{had thrown} threw sparks upon that roof shortly before the fire, and also that defendants ^{it} switch engine had thrown hot sparks a number of times to the knowledge of witnesses within a few weeks before and shortly after the fire, These witnesses did not identify very fully the engine to which they referred as the engine which plaintiff's witnesses testified passed by these sheds just before the fire. But a witness for defendant supplied this lack by testifying that the engine in question was the only engine which did switching at this point for six weeks before the fire and for some time after it. This proof that this engine threw hot sparks when drawing comparatively light loads tended to show that it was either not properly equipped or not properly handled. There was much testimony to contradict the case made by plaintiff's witnesses on the subject of the setting of the fire, but these instructions deprived plaintiff of the benefit of this statute, and cast upon him a burden which under the law he did not have, and deprived him of the proof above recited. We therefore feel it our duty to reverse the judgment and remand the cause.~~

Reversed and remanded.

and skill. This deprived plaintiff of the benefit of a statute, and was exactly contrary to the law governing the case. The court also gave the fifth instruction requested by defendant, which told the jury that there was no proof that the engine was not furnished with the most approved appliances for arresting sparks, and no proof that the engine and its appliances were not in good repair and no proof that the engine was not handled by a competent engineer. In fact there was proof that this engine threw sparks upon that roof shortly before the fire, and also that defendant's engine had thrown hot sparks a number of times to the knowledge of witnesses within a few weeks before and shortly after the fire. These witnesses did not identify very fully the engine to which they related as the engine which plaintiff's witnesses testified passed by these sheds just before the fire. But a witness for defendant implied this fact by testifying that the engine in question was the only engine which he saw switching at this point for six weeks before the fire and for some time after it. This proof that this engine threw hot sparks when drawing comparatively light loads would show that it was either not properly equipped or not properly handled. There was much testimony to contradict the case made by plaintiff's witnesses on the subject of the setting of the fire, but these instructions deprived plaintiff of the benefit of the statute, and cast upon him a burden which under the law he did not have, and deprived him of the proof above recited. We therefore feel it our duty to reverse the judgment and remand the case.

Reversed and remanded.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

6004

602

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

✓ Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 234

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6004

^{brought by}
Pasqualli Lolli, appellee

vs

Appeal from City Ct. Spring

Spring Valley Coal Company,

Valley.

appellant.

Dibell, J.

Appellee was injured December 19, 1913, while

driving a trip in ^{the} ~~A~~ mine, of ^{the defendant} ~~appellant~~, and he sued ^{from} ~~appellant~~

to recover damages for said injuries and had a verdict and

a judgment ^{in favor of the plaintiff} ~~from which defendant below appeals.~~ ^{q. The case was} The declara-

^{in defendant's alleged} ~~tion contains six counts, some for wilful violation of~~
^{permitted to the jury on counts of the demand} ~~the statute governing mines and miners, and at least one~~

~~count at common law. At or before the close of appellee's~~

~~evidence in chief, the first, fifth and sixth counts were~~

~~dismissed, and the verdict and the judgment rest upon the~~

~~second, third and fourth counts, which are each for wilful~~

~~violations of the statute. Each count charged that appell-~~

~~ant had rejected the Workman's Compensation Act.~~

The accident occurred in ^a ~~the~~ straight northeast entry
or roadway, ^{while he} Appellee was driving two mules tandem, ^{almost at the same time} A chain

went from the center of the forward car to the center of

a butt stick. The rails were 41 inches apart and the butt

stick was about 34 inches long. The rear mule wore a col-

lar and hames. On each side of the rear mule a tug extended

from the hames to the end of the butt stick and was hooked

thereon. ~~Appellee was driving in towards the face of the mine~~

The front car was partially loaded with props. Several men

who wished to go to the face, were in that car with ^{him} ~~him~~. Back

of that was an empty car. Appellee occupied the usual seat

of a driver on the left hand side in front, , with his legs

hanging down in front of the car. The trip was passing down

a slight decline. The car had no brake, and appellee had

no sprags with which to check the motion of the car.

980-1111, 1111-980

Approved from City Council

• 4215 V

Spring Valley Coal Company,

— 111 —

[illegible]

The accident occurred on a straight northeast entry on roadway. Appell was driving two miles per hour. A car went from the center of the roadway and the butt stick. The car was at the rear wheel and the butt stick was about 34 inches long. The rear wheel was a coil spring and hammer. On each side of the rear wheel a lug extended from the hammer to the end of the butt stick and was hooked thereon. A police officer in the rear of the car. The front car was partially loaded with goods. Several men who wished to go to the rear were in that car with him. Back of that was an empty car. Appell occupied the usual seat of a driver on the left hand side in front, with his legs hanging down in front of the car. The trip was a good one. The car had no brake and Appell had a slight decline. The car was with which to check the motion of the car.

In said entry at the place of the accident a post supporting the roof stood on the left hand side about 12 inches from the rail. At that point the rear mule turned around sideways with his rear parts to the left hand side. Appellee claims that the left end of the butt stick caught on this post. Appellee claims that the mule swung around first and that, if the butt stick caught upon the post at all, which it denies, it was after the mule had turned across the track and after appellee was injured. Appellee's left leg was caught either between the butt stick and the car or the mule and the car or both, and certain bones thereof were broken. Appellee claimed that the presence of this post, so near to the car, was a dangerous condition. Appellant contended that, as the post had been in the same place for three or four years, actual use showed that it was not dangerous.

The second count charged that the mine manager wilfully violated the statute in failing to have the roadway at that place examined by a certified mine examiner at the times required by the statute and to cause said examiner to report said dangerous condition in a book provided for that purpose before the men were permitted to enter the mine on that day. The third count charged that the mine examiner wilfully failed to inspect this roadway and to observe whether there were dangerous conditions, and wilfully failed to place a conspicuous mark at that dangerous place in the roadway. The fourth count charged that the mine examiner wilfully failed to make a record of his examination in a book kept for that purpose, and wilfully failed to mention in said record the dangerous condition at said timber, and wilfully failed to make such record that morning before the miners were permitted to enter the mine, and wilfully

In said entry at the place of the accident a post supporting the roof stood on the left hand side about 12 inches from the rail. At that point the rear mule turned around sideways with his rear parts to the left hand side. Appellee claims that the left end of the butt stick caught on this post. Appellee claims that the mule swung around first and that, if the butt stick caught upon the post at all, which it denies, it was after the mule had turned across the track and after appellee was injured. Appellee's left leg was caught either between the butt stick and the car or the mule and the car or both, and certain bones thereof were broken. Appellee claims that the presence of this post, so near to the car, was a dangerous condition. Appellant contended that, as the post had been in the same place for three or four years, actual use showed that it was not dangerous.

The second count charged that the mine manager willfully violated the statute in failing to have the roadway at that place examined by a certified mine examiner at the times required by the statute and to cause said examiner to report said dangerous condition in a book provided for that purpose before the men were permitted to enter the mine on that day. The third count charged that the mine examiner willfully failed to inspect this roadway and to observe whether there were dangerous conditions, and willfully failed to place a conspicuous mark at that dangerous place in the roadway. The fourth count charged that the mine examiner willfully failed to make a record of his examination in a book kept for that purpose, and willfully failed to enter in said record the dangerous condition at said timber, and willfully failed to make such report that morning before the miners were permitted to enter the mine, and willfully

failed to take possession of appellees entrance check and the checks of all others who had to drive trips along said roadway, and wilfully failed to give such entrance checks to the mine manager before the men entered the mine that morning. Each count charged that such wilful violation of the law caused or substantially contributed to appellee's injury.

~~In certain instances the trial court improperly permitted appellee to put leading questions to his witness in a very material matter, over the objection of appellant, and improperly permitted evidence to be introduced by appellee for which no proper foundation had been laid, over like objection, and perhaps unduly restricted appellant's effort to introduce evidence calculated to meet the evidence introduced by appellee. As the judgment must be reversed for other reasons, we deem it unnecessary to discuss these details or to determine whether that action amounts to reversible error.~~

~~Appellant complains of the refusal of certain instructions requested by it, by which it sought to make the question, whether the post, as located, was a dangerous condition to depend upon the judgment of the mine examiner and of men experienced in that business, and to relieve itself of liability if its mine examiner honestly concluded the condition was not dangerous. Appellant could not thus escape liability, if the condition was in fact dangerous in the opinion of the jury and the court, as shown in Aetitus v Spring Valley Coal Co. 150 Ill. App. 491, and 246 Ill. 32, and in the cases cited on page 39 of the latter volume; and said instructions were therefore properly refused.~~

~~There was proof that the book kept at the top, was kept in an engine room. The sixth instruction, given at the~~

failed to take possession of the same and the checks of all others who had to drive trips for the roadway, and finally failed to give such evidence as to the mine manager before the ten entered the mine that morning. Each count charged that such willful violation of the law caused or substantially contributed to a bell's injury.

In certain instances the trial court improperly permitted appellee to put leading questions to his witness in a very material matter, over the objection of appellant and improperly permitted evidence to be introduced by appellee for which no proper foundation had been laid, over the objection, and perhaps wrongly insisted appellee's effort to introduce evidence calculated to meet the evidence introduced by appellee. As the judgment may be reversed or other reasons, we deem it unnecessary to discuss these details or to determine whether that action amounts to reversible error.

Appellant complains of the refusal of certain instructions requested by it, which it sought to make the question, whether the point, as located, was a dangerous condition to depend upon the judgment of the mine examiner and if an experienced miner in that business, and to relieve itself of liability. It is the mine examiner honestly concluded the condition was not dangerous. Appellant would not then escape liability, if the condition was in fact dangerous in the opinion of the jury and the court, as shown in *Atkins v. Spring Valley Coal Co.*, 150 Ill. App. 431, and 230 Ill. 35, and in the case cited on page 38 of the latter volume; and said the instructions were therefore properly refused. There is no ground for the objection at the top, and that in an examination, the sixth instruction, given at the

request of appellee, recited the statute requiring the mine manager to have the mine examined by a mine ~~xxxxxx~~ examiner and his report entered in a book provided for that purpose, and that the book should be kept in a convenient place on top, but not in the engine room; and it directed a verdict of guilty if the jury found that appellee was injured because appellant wilfully failed to comply with those provisions of the law. This directed a verdict for plaintiff if his injury was caused by wilfully having said book in the engine room, instead of some other place on top. Besides the failure of the court in this or any other instruction to explain what engine room was meant, (this book not being in the main engine room, but in another engine room on top,) this instruction was erroneous because there was no allegation in the second, third or fourth counts that this book was kept in the engine room or in an improper place. True, as appellee argues, it is not error to state the law in the language of the law itself; but it is error to direct a verdict of guilty upon proof of a ground of action ~~not stated in the declaration.~~

The tenth instruction, given at the request of appellee told the jury that if a dangerous condition existed at said place and if the mine examiner wilfully failed to make a record thereof in a book kept for that purpose or wilfully failed to mention such condition in such record before the miners entered the mine that day, and appellee was injured by that condition, and his injuries were occasioned by such wilful failure of the mine examiner to make such record, then it made no difference whether, before entering the mine, appellee read or attempted to read said record which the mine examiner did make, nor whether appellee was able to read the language in which such entry was made, and

request of appellee, recited the statute requiring the
mine manager to have the mine examined by a mine
examiner and his report entered in a book provided for
that purpose, and that the book should be kept in a conven-
ient place on top, but not in the engine room; and it in-
structed a verdict of guilty if the jury found that appellee
was injured because appellant willfully failed to comply
with those provisions of the law. This directed a verdict
for plaintiff if his injury was caused by willfully having
said book in the engine room, instead of some other place on
top. Besides the failure of the court in this or any other
instruction to explain what engine room was meant, (this
book not being in the main engine room, but in another en-
gine room on top,) this instruction was erroneous because
there was no allegation in the second, third or fourth counts
that this book was kept in the engine room or in an improper
place. True, as appellee argues, it is not error to state
the law in the language of the law itself; but it is error
to direct a verdict of guilty upon proof of a ground of ac-
tion not stated in the declaration.

The tenth instruction, given at the request of appellee
told the jury that if a dangerous condition existed at said
place and if the mine examiner willfully failed to make
record thereof in a book kept for that purpose or willfully
failed to mention such condition in such record before
the miners entered the mine that day, and appellee was
injured by that condition, and his injuries were occasioned
by such willful failure of the mine examiner to make such
record, then it was no difference whether, before entering
the mine, appellee read or attempted to read said record
which the mine examiner did make, nor whether appellee was
able to read the language in which such entry was made, and

the jury should find the defendant guilty. In fact the mine examiner did make an entry of the condition of said entry and reported it safe in said book, so that the cause of action in that respect, if any, was not in failing to make any examination nor any entry in the book, but was in writing the word "safe" instead of stating the supposed dangerous condition created by said post. In determining whether the failure to make such a record that morning caused the injury to plaintiff, it certainly was competent for the jury to consider whether appellee read or attempted to read that record that morning, and whether he was able to read the language in which it was written, and this instruction was calculated to make the jury not consider the evidence on that subject, and we conclude that this instruction was for that reason erroneous.

It is a very close question from the evidence whether this post located as it was, constituted a dangerous condition within the meaning of the statute, and whether therefore there is a liability by appellant to appellee, and under such circumstances we conclude the judgment should be reversed for error in giving said sixth and ninth instructions. The judgment is therefore reversed and the cause remanded.

the jury should find the defendant guilty. In fact the mine
examiner did make an entry of the condition of said entry
and reported it safe in said book, so that the cause of
action in that respect, if any, was not in failing to make
any examination nor any entry in the book, but was in writ-
ing the word "safe" instead of stating the supposed dangerous
condition created by said post. In determining whether the
failure to make such a record that morning caused the injury
to plaintiff, it certainly was competent for the jury to
consider whether appellee read or attempted to read that
record that morning, and whether he was able to read the
language in which it was written, and this instruction
was included to make the jury not consider the evidence
that subject, and we conclude that this instruction was
for that reason erroneous.

It is a very close question from the evidence
whether this post located as it was, constituted a dangerous
condition within the meaning of the statute, and whether
therefore there is a liability by appellant to appellee,
and under such circumstances we conclude the judgment should
be reversed for error in giving said sixth and ninth instruc-
tions. The judgment is therefore reversed and the cause re-
manded.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

6023

605

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

✓Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff

193 I.A. 250

BE IT REMEMBERED, that afterwa, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6033

IN A TYPE OF THE THIRTEENTH CENTURY

THESE ARE THE ONLY REMAINS OF THE
OLD CITY OF THE THIRTEENTH CENTURY
AND THE ONLY REMAINS OF THE THIRTEENTH CENTURY
AND THE ONLY REMAINS OF THE THIRTEENTH CENTURY

068 A. 320

THESE ARE THE ONLY REMAINS OF THE

OLD CITY OF THE THIRTEENTH CENTURY

AND THE ONLY REMAINS OF THE THIRTEENTH CENTURY



THESE ARE THE ONLY REMAINS OF THE
OLD CITY OF THE THIRTEENTH CENTURY
AND THE ONLY REMAINS OF THE THIRTEENTH CENTURY
AND THE ONLY REMAINS OF THE THIRTEENTH CENTURY

action by D.
Gen. No. 6023.

Simon Kostellic, Admr. Appellant.

—vs—

Appeal from Putnam.

Sydney Whitaker, Appellee

Diboll, J.

to recover for the death of T. who was killed 11/13
~~On July 9, 1913, Frank Kostellic~~ was killed by

coming in contact with an electric wire lying on or near a sidewalk ~~on Main Street~~ in the Village of Grenville, in Putnam County. The wire was a part of an electric light system owned and operated by ~~Sydney Whitaker in Grenville, and was used as a part of his entire system of wiring to convey electric current to his patrons in Grenville and surrounding villages. Simon Kostellic, a brother of deceased, was appointed administrator of his estate and brought this suit to recover damages for the loss sustained by his next of kin. He filed a declaration of six counts, and a demurrer to the third count was sustained. There was a plea of not guilty and a jury trial and a verdict and a judgment for defendant, from which plaintiff below appeals.~~

On the evening before the accident ~~here in question~~ *was* there ~~had been~~ a storm in Grenville, which broke off a portion of a tree standing in the yard of one of the witnesses, and the upper part of ~~this tree~~ *which* fell ~~xxx~~ *exactly* over upon the wires of appellee which were extended upon poles standing near the sidewalk. About seven o'clock ~~on the morning of July 9, the~~ *next* wires gave way and the tree fell over and upon the sidewalk, and the wires remained hanging from the poles and reaching to and upon the ground. ~~At least one of the neighbors seems~~ *has been seen to* to have noticed the position of the wires at the time of breaking, but ~~does~~ *did* not appear to have notified any one of the condition. Frank Kostellic at that time was about thirteen years old, in good health and possessed of all his faculties. ~~He lived with his parents in a little village near~~ *deceased*

on Kestellie, after...

Against from...

day, Kestellie, after...

July, 1.

On July 1, 1917, Frank Kestellie was killed by

being in contact with an electric wire lying on or near a
certain entrance to the Village of Greenville, in Platte

County. The wire was a part of an electric light system owned
and operated by the Greenville Electric Light and Power Company.

Part of the wire was strung to a pole electric
light system in the Village of Greenville.

On the evening of the 1st of July, 1917, the wire was
strung to a pole in the Village of Greenville.

The wire was strung by the Greenville Electric Light and Power
Company, and was used for the purpose of lighting the Village of Greenville.

On the evening of the 1st of July, 1917, the wire was
strung to a pole in the Village of Greenville.

On the evening of the 1st of July, 1917, the wire was
strung to a pole in the Village of Greenville.

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strung to a pole in the Village of Greenville.

Granville and was sent by his mother that morning to Granville on an errand. He was last seen alive by ^{a man} Hazel Spires and ~~was then~~ about 11:30 o'clock that morning, crossing Main Street to the sidewalk on which this tree was lying and about half a block from the tree. Miss. Spires went into her house, which was directly opposite the place where deceased crossed the street, and remained there about ten minutes. ^{a man} She then started down Main Street, and when she reached the tree she attempted to go around it and saw the body of deceased lying on the ground on its back, with one wire under him and another wire on his breast, his clothing on his breast on fire and the wires spitting fire. There was no eye witness to the accident and no one can tell exactly how it happened. Engineer Jakely, in charge of the ^{plant} ~~on the morning in~~ question, testified that he felt a jerk or jolt in the machinery about seven o'clock that morning, ^{and} believed there was something unusual on the line, made tests with the appliances at the plant for that purpose, ^{but} found no evidence that any wires were grounded, and paid no further attention to the matter until informed of the accident a few minutes after it happened. The appliance used by Jakely was known as a "plug-in circuit breaker," and there ^{is} ~~is~~ evidence by ³ ~~certain witnesses~~, ~~qualifying as~~ experts in electrical matters, that the use of such an instrument to determine whether or not a wire is broken is of no avail, unless it is used at the very instant the wire falls, or unless the wire remains on the ground and makes a complete short circuit. It also appears from the evidence of these experts that if a "static ground detector" or an "automatic circuit breaker" had been in use upon the switch board of this plant, the current in the wires in question would have been shut off automatically the instant the wires parted. No such static machine had been installed, but there was one at the ~~plant~~ ^{plant} for the purpose of being installed.

...ville and was kept by his mother that morning to Greenville
on an ... He was last seen alive ... and
... about 11:30 o'clock that morning, ...
... to the ... on which this tree was lying ...
... a block from the tree. Miss. ...
... which was directly opposite the place where ...
... the street, and ... about ten minutes ...
... then ... from ... and ... the ...
... one ... to ... around it ... the body of ...
... lying on the ground ... back, with one ...
... on his breast, his ... on his breast on
... the ... splitting ... There was no eye witness
... and no one can tell exactly how it happened.
... in ... of the ...
... that he felt a jerk or jolt in the ...
... about seven o'clock that morning, ... there was something
... of the time, ... with the ... at the
... found no evidence that ...
... and paid no further attention to the matter until
... of the accident a few minutes after it happened. The
... by ... as a "ping-in circuit"
... and ... evidence ...
... is electrical ... that the use of such
... to ... of ... is broken
... as well, ... at the very instant the
... on ... on the ground ...
... It also ... from the
... of ... a "static ground detector"
... an "automatic circuit breaker" and ... upon the
... of this plant, the circuit in the area in question
... been ...
... No such static machine had been installed, but

~~In this condition of the evidence it was essential that the jury should be correctly instructed, as it was a question of fact to be determined by it whether or not appellee had been guilty of any negligence in the equipment and operation of its plant, and in its failure to take further steps to ascertain whether any accident had happened to its wires after noticing something unusual in the machinery about seven o'clock that morning. The 27th. instruction given at the request of appellee, read in part as follows:~~

"Each separate and distinct count must be treated as a separate and distinct and sole cause of action and must be so established by the plaintiff by the greater weight of all the evidence in the case before any finding can be made in his favor by the jury or under either of said counts." This is equivalent to telling the jury that, if each count was not proven, there could not be a verdict for the plaintiff under any count. The first count of the declaration charged negligence on the part of appellee in allowing a current of electricity of high and dangerous voltage to escape from its wires while the same were lying on the ground, and in permitting the wires to be and remain out of repair; the second count charged the same condition and averred that, by the exercise of reasonable diligence, appellee could have known that its wires, etc., were not in reasonably good condition and repair; the fourth count charged negligence on the part of appellee in permitting its wires, cross arms and poles to become worn, unsafe and dangerous, a condition which could have become known to appellee by the exercise of reasonable care and caution whereby its wires fell into the street and deceased was killed; the fifth count attributed negligence to appellee in failing to equip his plant with proper appliances, so that by the exercise of reasonable diligence within

In this condition the evidence is presented at the trial. It should be noted that it is a question of fact as to whether or not the defendant had been guilty of any negligence in the design and construction of the plant, and in its failure to take further steps to prevent another accident from occurring. The witness testimony about seven o'clock last morning. The fifth instruction given at the request of appellee, read in part as follows:

"When separate and distinct counts must be treated as a separate and distinct and sole cause of action and must be so established by the plaintiff by the greater weight of all the evidence in the case before any finding can be made in his favor by the jury or under either of said counts." This is equivalent to telling the jury that, if each count is not proven, there could not be a verdict for the plaintiff under any count. The first count of the declaration charges negligence on the part of appellee in allowing a current of electricity of high and dangerous voltage to escape from its wires while the same were lying on the ground, and in permitting the wires to be and remain out of repair; the second count charged the same condition and averred that, no exercise of reasonable diligence, appellee could have known that the wires, etc., were not in reasonably good condition and repair; the third count charged negligence on the part of appellee in permitting the wires, cross arms and poles to become worn, unsafe and dangerous, a condition which could have been known to appellee by the exercise of reasonable care and caution whereby the wires fell into the street and deceased was killed; the fifth count attributed negligence to appellee in failing to equip his plant with proper appliances, so that by the exercise of reasonable diligence within

~~a reasonable time after the breaking of any of his wires, he could learn of such breaking and shut off the current; and the sixth count charged negligence in failing to keep his appliances and machinery in such a proper state of repair that he could be informed of the dangerous condition of the wires carrying such high and dangerous current of electricity. Under this declaration, it was error to give the 27th. instruction. The 26th. instruction, given at the request of appellee, told the jury that if the machinery at the plant was equipped with approved and modern appliances for the prevention of the escape of electricity therefrom, and with effective appliances for detecting the escape of electricity and if the same were in good repair, and if such machinery was at the time carefully and properly managed by competent servants, then plaintiff could not recover. This instruction entirely excluded from the jury the question whether or not appellee was negligent in not detecting the break in the wires in some other way and in not repairing it before the accident. While, perhaps, there is but slight evidence in the record to show that the breakage should or could have been detected in some other way than the one employed by Jakely, yet that question should not have been taken from the jury, Instruction No. 23, given at the request of appellee told the jury that it was sufficient in this case if appellee used a high degree of diligence in equipping its engines, dynamos, etc., with standard appliances, devices and apparatus which are generally recognized as effective for the purpose of detecting the condition of repair of the lines in service passing out of, to and upon the streets and alleys of the village of Granville. This instruction ignored the fact that, even though appellee had equipped his plant with all necessary machinery and appliances, yet there was evidence tending to show~~

responsible for the failure of any of his first, he
last term of such testing and all the others; and
the sixth count charged negligence in failing to train his
applicant and security in such proper state of repair
that he could be in the way of the dangerous condition of the
fire of any high and dangerous current of electricity.
Under this heading, the jury was first to give the 27th, in-
struction. The 28th instruction, given at the request of
the jury, told the jury that if the defendant at the time
was equipped with a covered and modern appliances for the
protection of the source of electricity, and with
effective and proper testing the source of electricity
and if the defendant was not negligent, and if such negligence was
not the cause of the fire, and if such negligence was not
caused, in a defendant would not recover. The instruction
entirely excluded from the jury the question whether or not
applicant was negligent in not detecting the leak in the
fire in some other way and in not repairing it before the
accident. This, however, there is but slight evidence
in the record to show that the plaintiff should have
been notified in some other way than the one employed by
himself, yet this instruction would not have been taken from
the jury, Instruction No. 27, given at the request of the jury
told the jury that it was sufficient in this case if the jury
used a high degree of diligence in inspecting the engine,
boilers, etc., with standard appliances, devices and apparatus
which are generally considered as effective for the purpose
of detecting the condition of repair of the lines in service
keeping out of the way and when the electric and other
voltage of the engine. This instruction removed the fact that
even though applicant had kept his sight with all necessary
care and appliances, yet there was evidence tending to show

~~that he failed to maintain such appliances in good condition, and failed to operate such appliances in a careful and skillful manner. The mere presence of such machinery and appliances was not sufficient, under this declaration and proof without proper maintenance and operation.~~

We thus have a condition of the evidence tending to show that there had been a severe storm at Granville the night before the accident; that, because of such storm, a tree had been blown over upon the wires of appellee and had remained there all night and caused the wires to break about seven o'clock the following morning; that, at that time, the engineer of appellee, who was in charge of the plant, noticed an unusual condition of the machinery and made one test with a certain appliance at the plant to ascertain what was the matter; that, according to certain experts testifying at the trial, such appliance was ineffective for the purpose; that appellee and his servants made no other effort that morning to ascertain whether or not there was any trouble with the wires carrying a deadly current of electricity until notified of the accident to deceased four and one half hours later; and that appellee had at his plant a certain other appliance, which experts testified would have prevented this accident if in use, but which appellee had not installed on his switchboard. There was also evidence tending to show that the cross arm on the pole nearest the point where the wires broke was rotten and had been in that condition for some time. In this condition of the record, it was a question for the jury whether or not appellee had exercised due care ~~for~~ in the construction, equipment, maintenance and operation of his plant and its accessories, and we are of opinion that for error in giving the instructions above stated, this cause should be presented to another jury. The judgment is therefore reversed and the cause remanded. Niehaus, J. took no part.

...the fact that in such appliances in good condition, and that to create such a condition in a certain and ...
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...the fact that in such appliances in good condition, and that to create such a condition in a certain and ...

We thus have a condition of the evidence tending to show
that there had been a severe storm at Granville the night
before the accident; that, because of such storm, a tree had
been blown over upon the wires of apelles and had remained
there all night and caused the wires to break about seven
o'clock the following morning; that, at that time, the engineer
of apelles, who was in charge of the plant, noticed an
unusual condition of the machinery and made one test with a
certain appliance at the plant to ascertain what was the matter;
that, according to certain experts testifying at the trial,
such appliance was ineffective for the purpose; that apelles
and his servants made no other effort that morning to ascertain
whether or not there was any trouble with the wires carrying
the heavy current of electricity until notified of the accident
to deceased four and one-half hours later; and that apelles
had at his plant a certain other appliance, which experts
testified would have indicated this accident if in use, but
which apelles had not installed on his switchboard. There
was also evidence tending to show that the cross arm on the
pole nearest the point where the wires broke was rotten and
had been in that condition for some time. In this condition
of the record, it was a question for the jury whether or not
apelles had exercised due care in the connection,
equipment, maintenance and condition of his plant and its
accessories, and we are of opinion that for error in giving
the instructions above stated, this cause should be presented
to another jury.
The instant is therefore reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.



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606

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 253

PH Denied Apr. 15/15

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION

Published weekly, except on Sundays, by the American Medical Association, 535 North Dearborn Street, Chicago, Ill.
Subscription price, \$5.00 per annum in advance. Single copies, 15 cents.
Entered as second-class matter, October 3, 1917, under post office number 384, at Chicago, Ill., under special agreement of post office and postmaster. Accepted for mailing at special rate of postage provided for in Act of October 3, 1917, authorized on July 1, 1918. Postpaid.

803.1.1.01

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Gen. No. 6027.

Louisa J. Owens, appellee.

vs

Appeal from Whiteside.

Gerhardt M. Cassens, appellant.

Dibell, J.

~~This is a suit in assumpsit, brought in March, 1912, by~~
Louisa J. Owens against Gerhardt M. Cassens ^{to her} ~~whereby, according~~
~~ing to an amended bill of particulars, plaintiff sought to~~
~~charge defendant with \$2,000 loaned the defendant, with \$2000~~
~~held in trust for plaintiff, with \$650 entrusted to defend-~~
~~ant with which to pay for certain patents, with \$1,000~~
as plaintiff's share of certain moneys realized by defendant
from the sale of various other patents to the Rock River
Manufacturing Company of Dixon, Illinois, with \$1,000 due
on various ~~xxxxxxx~~ ^C amounts, and with \$600 paid defendant
as the purchase price of still other patents. Defendant
filed a plea of the general issue and a counter claim, whereby
he sought to charge plaintiff with \$3,000 loaned to her, with
\$1,000 expended by him for the use of plaintiff, with \$2,000
for the purchase of a one half interest in certain patents,
with \$1,000 paid a third person for the benefit of plaintiff
and with \$1,000 accrued interest on these various sums.
~~Afterwards defendant filed a plea of the Statute of Limita-~~
~~tions, setting up that on or about February 25, 1906, an ac-~~
~~count had been stated between the parties that there had~~
~~been no renewals or payments thereon, and that plaintiff's~~
~~cause of action did not accrue within five years before the~~
~~commencement of this suit. Plaintiff traversed said plea,~~
~~and also replied to said plea specially to the effect that~~
~~she had lianed large sums of money to defendant who was her~~
~~brotherinlaw, with which to purchase patents or an interest~~
~~therein for her; that she had trusted him but had discovered~~

Louis J. Owens, appellee.

vs
Appel from White.

Gerhardt M. Cassens, appellant.

Dated, 7.

This case was brought in assumpsit, brought in assumpsit, by
Louis J. Owens against Gerhardt M. Cassens, appellant, assumpsit
for an extended bill of particulars. Plaintiff sought to
charge defendant with \$3,000 loaned the defendant, with \$2000
held in trust for plaintiff, with \$50 entrusted to defendant
and with which to pay for certain patents, with \$1,000
as plaintiff's share of certain moneys realized by defendant
from the sale of various other patents to the Rock River
Manufacturing Company of Dixon, Illinois, with \$1,000 due
on various accounts amounts, and with \$800 paid defendant
as the purchase price of still other patents. Defendant
filed a plea of the general issue and a counter claim, whereby
he sought to charge plaintiff with \$3,000 loaned to her, with
\$1,000 expended by him for the use of plaintiff, with \$3,000
for the purchase of a one half interest in certain patents,
with \$1,000 paid a third person for the benefit of plaintiff
and with \$1,000 accrued interest on these various sums.
Plaintiff defendant filed a plea of the statute of limitations,
setting up that on or about February 25, 1906, an account
could not have been stated between the parties that there had
been no renewal or payment thereon, and that plaintiff's
cause of action did not accrue within five years before the
commencement of this suit. Plaintiff traversed said plea,
and also replied to said plea specially to the effect that
she had loaned large sums of money to defendant who was her
brother-in-law, with which to purchase patents or an interest
therein, for her.

~~that defendant's representations to her regarding the purchase of patents by him for her with her money were untrue and that he had never expended her money for that purpose; and that she had made such discovery within the period of five years prior to the commencement of this suit.~~

~~A jury was waived and the case was tried before the court, and in June 1914, a judgment was entered in favor of plaintiff against defendant for \$1,345.00 and costs, from which judgment defendant below appeals.~~

The evidence in ^{was} ~~this case~~ is not only conflicting but in many respects vague, indefinite and uncertain. ^{But kind of a plan} It is clear that appellee conducted financial transactions with appellant involving considerable sums of money and extending over many years; but neither of the parties appear able to give definite testimony regarding the details of these transactions. ~~A study of the evidence from the record itself leads~~ us to conclude that the preponderance of the evidence reveals the conditions hereafter stated.

Appellee and the wife of appellant were sisters, and in the settlement of the estate of their deceased father appellants wife became the owner of certain lands in Whiteside county, subject to a mortgage thereon for \$3,000 in favor of appellee. When appellant married appellee's sister, said sum of \$3,000 was still unpaid. A short time thereafter appellant bought 80 acres of land from appellee and gave her a note for \$5,000 (apparently signed by his wife and himself) as part of the purchase price, secured by a mortgage on said lands. Appellant and his wife were therefore jointly indebted to appellee in the sum of \$8,000 but this total indebtedness seems to have been treated by both the parties to this suit as the debt of appellant. Thereafter appellant paid appellee \$3000 on this debt by buying a house

that defendant's representation to him that the money was not his, and that he had never expended the money for that purpose, and that he had such discovery within the period of five years prior to the commencement of this suit. A jury was sworn and the case was tried before the court, and in June 1914, a judgment was entered in favor of plaintiff against defendant for \$1,348.00 and costs, from which judgment defendant below appeals.

The evidence in this case is not only conflicting but in many respects vague, indefinite and uncertain. It is clear that appellee conducted financial transactions with appellant involving considerable sums of money and extending over many years, but neither of the parties appears able to give definite testimony regarding the details of these transactions. A study of the evidence from the record itself leads us to conclude that the respondents of the evidence reveals the conditions hereafter stated.

Appellee and the wife of appellant were sisters, and in the settlement of the estate of their deceased father, appellee was named as the owner of certain lands in White side county, subject to a mortgage thereon for \$3,500 in favor of appellee. When appellant married appellee's sister, said sum of \$3,000 was still unpaid. A short time thereafter appellant bought 80 acres of land from appellee and gave her a note for \$2,500 (apparently signed by his wife and himself) as part of the purchase price, secured by a mortgage on said lands. Appellant and his wife were therefore jointly indebted to appellee in the sum of \$5,000 but the total indebtedness seems to have been treated by both the parties to this suit as the debt of appellant. Thereafter appellant paid appellee \$3,000 on this debt by paying a house

and lot for her in the city of Sterling. Later, appellant and appellee together purchased a farm in Manitoba, for which appellant paid and in which appellee's share amounted to about \$3,000. After the purchase of this Canadian farm and either in 1906 or 1907, appellee and appellant had a meeting and a settlement. Appellee and her husband testified that the result of the accounting had at the settlement meeting showed that there was a balance due appellee from appellant of about \$1400.00 while appellant denied this, and claimed, at one point in his testimony, that the accounts were all square between himself and his sister-in-law, while at another time he claimed that there was due him under this settlement the sum of ~~\$22x22.~~ \$2800. The statements of appellant with regard to this accounting and settlement are not consistent with each other, and do not agree with other circumstances in the case, and as both appellee and her husband testify positively that the settlement showed there was due appellee the sum of \$1400.00 we consider that position upheld by the preponderance of the evidence.

The evidence further shows that after this accounting and settlement appellant bought an interest or interests in various patents connected with the making of barbed wire. Appellee claims that she authorized appellant, at his solicitation, to invest \$1,000 of the money still due her in such patents for her, and that he always claimed to her that he had made such an investment of her money. Appellant contends that, while he did invest in some patents, it was on behalf of himself and appellee's husband, Charles E. Owens; that the first lot of patents he bought in this way were sold to the Rock River Manufacturing Company, of Dixon Illinois, and the proceeds used to pay debts, except a small

and lot for her in the city of St. Louis, later, Appellant and Appellee together purchased a farm in Mississippi, for which Appellant paid and in which Appellee's share amounted to about \$3,000. After the purchase of this Canadian farm and either in 1908 or 1907, Appellee and Appellant had a meeting and a settlement. Appellee and her husband testified that the result of the accounting had at the settlement showed that there was a balance due Appellee from Appellant of about \$1400.00 while Appellant denied this, and claimed, at one point in his testimony, that the accounts were all square between himself and his sister-in-law, while at another time he claimed that there was due him under this settlement the sum of \$2222.22. The statements of Appellant with regard to this accounting and settlement are not consistent with each other, and do not agree with other circumstances in the case, and as both Appellee and her husband testify positively that the settlement showed there was due Appellee the sum of \$1400.00 we consider that position upheld by the preponderance of the evidence.

The evidence further shows that after this accounting and settlement Appellant bought an interest or interests in various patents connected with the making of barbed wire. Appellee claims that the money was paid to her in such a manner that she always claimed to her that she had made such investment of her money. Appellant contends that while he did invest in some patents, it was on behalf of himself and Appellee's husband, Charles E. Evans; that the first lot of patents he bought in this way were sold to the Rock River Manufacturing Company, of Dixon, Illinois, and the proceeds used to pay debts, except a small

balance distributed among the members of a small company interested therein; and that the second lot of patents were tried out and found to be without value. Appellant's evidence in this regard is not consistent throughout. He admits that he purchased interests in two different sets of patents at two different times, and that he did not make these investments for himself alone, but that he put up the money. At least it is a fair inference that he put up the money, for nowhere in the record have we been able to find any evidence ~~xxxxing~~ tending to show that Charles F. Owens himself put up ~~xxx xxxxx~~ any money. Neither is there any evidence that appellant owed any money to Charles F. Owens. Appellant is therefore in the position of claiming that he put up money with which to purchase patents for Charles F. Owens, without any existing reason why he should advance money for Owens, and without any evidence to show that he ever made a demand on Owens to repay the money so advanced by appellant. It seems to us very improbable that appellant would so act. On the other hand, as we have already stated, the preponderance of the evidence shows that appellant was indebted to appellee in the sum of \$1,400.00 and that condition of affairs would make it entirely natural that he would advance the money with which to purchase an interest for appellee in these patents, and thereby, in effect, pay so much on his debt to appellee. This would also explain appellant's failure to demand a return to him of the money he so advanced. We conclude that the preponderance of the evidence shows that appellant did make these investments in such patents for the benefit of appellee.

With regard to the two investments made by appellant in patents for himself and for appellee, the evidence in the record seems to show that the first investment took

...ance distributed among the members of a small company
interested therein; and that the record in fact
... tried out and found to be without value. Appellant
... in this record is not constant throughout. The
... that he purchased interests in two different estates
... at two different times, and that he did not make
... investments for himself alone, but that he put up the
... At least it is a fair inference that he put up the
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... evidence tending to show that Charles F. Owens
... put up any money. Whether it is likely
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... for Owens, and without any evidence to show that he
... a demand on Owens to repay the money so advanced
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... on his debt to appellee. This would also explain
... failure to demand a return to him of the money
... We conclude that the preponderance of the
... shows that appellant did not make investments
... for the benefit of appellee.
... with regard to the two investments made by appellant
... for himself and for appellee, the evidence in
... record seems to show that the first investment took

\$1,000 of the money then due from appellant to appellee, entitling appellee to an interest in those patents to that extent, and leaving appellee still his creditor to the extent of about \$400.00; that the second investment for appellee was also in the sum of \$1,000 thereby using up appellee's balance and leaving her indebted to appellant for about \$600; that appellee settled this \$600 indebtedness by giving a check to appellant for \$500. signed by herself and her husband, and also by turning over to appellant a note then in her possession and belonging to her for about \$100; that the first lot of patents was sold to the Rock River Manufacturing Company for but little more than enough to pay certain debts; but that the second lot of patents was sold to a Mrs. Martin together with all of the assets of a corporation known as the Sterling Machine Works, in which appellant and Owens were interested, for the sum of \$8,000. No accounting was made to appellee of the moneys received from this sale to Mrs. Martin. While no proof was offered by either side to show that any profits were made on this last sale, which should have been divided and a part paid to appellee as a dividend on her purchase of an interest in these patents, on the other hand, there was no evidence that it was necessary to use this sum of \$8,000 or any part of it to pay debts with and we conceive appellee to be entitled to the return of her investment of \$1,000 out of the proceeds of the sale, if nothing more. This sale was made on the 8th. of August A. D. 1907, and appellee should receive not only the \$1,000 invested by her, but also interest at the rate of five per cent thereon from that date up to the date of the judgment. Such interest at that rate would amount to practically \$345.00 and with the sum of \$1,000 to be returned to her, makes the amount of the judgment entered herein. We believe that the

amount of the judgment entered herein. We believe that the interest at that rate would amount to practically \$32.00 thereon from that date up to the date of the judgment. Such by her, but also interest at the rate of five per cent 1907, and appellee would receive not only the \$1,000 invested nothing more. This sale was on the 8th of August A. D. investment of \$1,000 out of the proceeds of the sale, if and a concise appellee is entitled to the return of her use this sum of \$8,000 or any part of it to pay debts, if other hand, there was no evidence that it was necessary to on her purchase of an interest in these patents, on the have been divided and a part paid to appellee as a dividend that any profits were made on this sale, which should Martin. While no proof was offered by either side to show to appellee of the money received from this sale to Mrs. interested, for the sum of \$8,000. No accounting was made the Sterling Machine Works, in which appellant and Oens were together with all of the assets of a corporation known as but that the second lot of patents was sold to a Mrs. Martin Company for but little more than enough to pay certain debt; that lot of patents was sold to the Rock River Manufacturing possession and belonging to her for about 100; that the and also by turning over to appellant a note then in her to appellant for \$500, signed by herself and her husband, that appellee settled this \$500 indebtedness by giving a check balance and leaving her indebted to appellant for about \$600; was also in the sum of \$1,000 thereby making up appellee's amount of about \$400.00; that the second investment for appellee extent, and leaving appellee still his creditor to the extent, and leaving appellee to an interest in those patents to that \$1,000 of the money was due from appellant to appellee.

preponderance of the evidence sufficiently shows that appellee was entitled to recover that amount.

Appellant claims that, as more than five years elapsed between the time of the settlement and accounting between the parties and the time of the commencement of this suit, during which nothing was paid by appellant to apply on the amount he owed appellee, the Statute of Limitations should prevent appellee from recovering. We are unable to agree with this position. After the accounting appellee authorized appellant to make investments for her with the money he owed her and which, in effect, he was holding in his possession. Appellant was her relative by marriage and had been acting as her business agent for many years. She had intrusted him with the investment of her money, and it is clear to us that he was acting in a confidential and fiduciary capacity towards her ~~xxx~~ and was bound to act fairly towards her and keep her fully informed of all his transactions with regard to her money. This he did not do. He made no disclosure of his sale of these patents to Mrs. Martin, and appellee first obtained her knowledge of such transfer from Mrs. Martin long after the event had occurred. While the evidence as to the exact date when appellee learned of this sale is not clear, yet we feel justified from the evidence in concluding that it was within the statutory period, and also that, by reason of his relations to appellee, appellant cannot be allowed to avail himself of the protection of the Statute of Limitations.

As we have stated above, the evidence does not furnish us with a very clear statement of the exact facts in this case. But we find sufficient evidence to justify us in concluding that appellant was indebted to appellee in the sum of \$1,400 at the time of the accounting referred to above,

reponderance of the evidence sufficiently shows that appellee
as entitled to recover what amount.
Appellant claims that, more than five years elapsed
between the time of the settlement and accounting between the
parties and the time of the commencement of this suit,
during which nothing was paid by appellant to apply on the
amount he owed appellee, the Statute of Limitations should
prevent appellee from recovering. We are unable to agree
with this position. After the accounting appellee authorized
appellant to make investments for her with the money he owed
her and which, in effect, he was holding in his possession.
Appellant was her relative by marriage and had been acting
as her business agent for many years. She had intrusted him
with the investment of her money, and it is clear to us that
she was acting in a confidential and fiduciary capacity to-
wards her husband and was bound to act fairly towards her and
keep her fully informed of all his transactions with regard
to her money. This he did not do. He made no disclosure of
his sale of these patents to Mrs. Martin, and appellee
first obtained her knowledge of such transfer from Mrs.
Martin long after the event had occurred. While the evi-
dence as to the exact date when appellee learned of this
sale is not clear, yet we feel justified from the evidence
in concluding that it was within the statutory period, and
that, by reason of his relations to appellee, appellant
cannot be allowed to avail himself of the protection of
the Statute of Limitations.
As we have stated above, the evidence does not furnish
us with a very clear statement of the exact facts in this
case. But we find sufficient evidence to justify us in
concluding that appellant was indebted to appellee in the
sum of \$1,400 at the time of the accounting related to above.

that he invested her money thereafter in certain patents, and that he did not deal fairly by her in the various sales of such patents nor advise her thereof nor account to her therefor. The trial judge saw the witnesses and heard them testify, and we find nothing in the record that would justify us in holding that his view of the evidence was without a sufficient foundation.

The judgment is therefore affirmed.

that he invested her money thereafter in certain patents,
and that he did not deal fairly by her in the various sales
of such patents nor advise her thereof nor account to her
therefor. The trial judge saw the witnesses and heard their
evidence, and we find nothing in the record that would justify
a finding that his view of the evidence was without a
sufficient foundation.

The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. ✓DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 284

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6046

Minnie E. Parks, appellee

vs

Appeal from Kane.

I. M. Western, Admr. etc. appellant.

Dibell, J.

~~Mrs.~~ Minnie E. Parks filed a claim against the estate of her deceased ~~husband~~ brother, Merreles E. Covey, in the probate court of Kane County upon a judgment note, dated ~~Elgin, March 28, 1907,~~ ^{her} payable to the order, ~~of Mrs. Minnie Parks~~ for \$3,500, with ~~interest at six per cent per annum from date till paid,~~ bearing the signatures of Merreles E. Covey and Caroline E. Covey, ~~(who was~~ the mother of Mrs. Parks and M. E. Covey), on the back of which was endorsed the payment of \$200 on the ~~note~~ on October 30, 1907, and the payment of interest on March 28 in the years 1909, 1910 and 1911. The administrator filed an affidavit, denying the execution of the note by M. E. Covey. The cause was tried in the probate court and the claim was allowed in full. The administrator appealed to the circuit court, where there was a jury trial and a verdict for the full amount of the note. The administrator ~~died, and his successor, after a motion for a new trial was denied and a judgment entered for the amount of the verdict and interest, appealed to this court.~~

~~Appellee contends that since the affidavit denying~~ the execution of the note is not contained in the bill of exceptions, she was not required to prove the execution of the note, and evidence denying the execution was incompetent. In cases where there is an affidavit of claim with a declaration in an action of assumpsit and an affidavit of merits with a plea in such action, it has not been required that said affidavit should be preserved in the bill of exceptions, so far as we are advised, and we therefore treat the affidavit as

Gen. No. 6046

Minnie E. Parks, appellee

vs

Appellant from Kane.

I. M. Western, Admr. etc. appellant.

Dibell, J.

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tate of her deceased ~~xxxxxx~~ brother, Merriess E. Covey, in

the probate court of Kane County upon a judgment note, dated

April, March 28, 1907, payable to the order of Mrs. Minnie

Parks for \$3,500 with interest at six per cent per annum

from date of date, bearing the signatures of Merriess E.

Covey and Caroline E. Covey, (who was the mother of Mrs.

Parks and M. E. Covey), on the back of which was endorsed the

payment of \$300 on the note on October 30, 1907, and the pay-

ment of interest on March 28 in the years 1902, 1910 and 1911

The administrator filed an affidavit, denying the execution

of the note by M. E. Covey. The cause was tried in the

probate court and the claim was allowed to fail. The admin-

istrator appealed to the circuit court, where there was a

jury trial and a verdict for the full amount of the note. The

administrator filed, and his successor, after a motion for a

new trial was denied, and a judgment entered for the amount

of the verdict and interest, appealed to this court.

Appellee contends that since the affidavit denying

the execution of the note is not contained in the bill of

exceptions, she was not required to prove the execution of

the note, and evidence denying the execution was incompetent.

In cases where there is an affidavit of claim with a declaration

in an action of assumpsit and an affidavit of merits with a

plea in such action, it has not been required that said

affidavit should be preserved in the bill of exceptions, so

far as we are advised, and we therefore treat the affidavit as

~~in effect a pleading in this case. We also call attention to Sec. 65 of the Administration Act.~~

The main question is whether the state of the evidence is such as not to support a verdict for appellee. She produced quite a number of business men, who dealt with M. E. Covey in his lifetime, who testified that in their opinion the first signature to said note was the genuine signature of M. E. Covey. Appellant introduced about the same number of business men, who testified that in their opinion it was not the genuine signature of M. E. Covey. Two or three of these had had a better opportunity to know his signature than the witnesses for appellee. Some of appellant's witnesses on that subject, however, were not at all sure but that it was his genuine signature, and several of them admitted that it strongly resembled his signature. Two experts in handwriting, after examining signatures of M. E. Covey, conceded to be genuine, declared this signature not to be genuine, but their theories on the subject were not harmonious. A daughter of appellee testified that she and her mother and her grandmother, Caroline E. Covey, left for California on October 31, 1907, and that on the day before, her uncle, M. E. Covey, came to her mother's house and paid her mother \$200 on this note, and that the note was produced and she saw the endorsement of that payment which now appears on the back of said note written thereon in the presence of M. E. Covey and also that she was present when at least two of the interest payments thereafter endorsed thereon were made and saw the interest paid by her uncle and saw the endorsement of such interest made on the back of this note in her uncle's presence. Ray Shoonhoven, a son of appellee, testified that he was present when his uncle paid \$200 on this note, and that the note was exhibited then and the endorsement

in effect a witness in this case. The only other witness
 to the execution of the instrument was

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but held theories on the subject are not harmonious. A
 daughter of appellee testified that she and her mother and
 her grandmother, Caroline E. Covey, left for California on
 October 31, 1907, and that on the day before, her uncle,
 W. E. Covey, came to her mother's home and said her mother
 "Gave me this note," and that she note was genuine, and she saw
 the endorsement of that day and which now appears on the back
 of said note written thereon in the presence of M. E. Covey

and also that she was present when at least two of the in-
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 of each interest made on the back of this note in her uncle's
 presence. Ray Schoonhoven, a son of appellee, testified
 that he was present when his uncle said "Gave me this note,"
 and that the note was exhibited then and the endorsement

thereof made on this note, and that his mother and grandmother left for California the next day. He also testified that he was present on two occasions when M. E. Covey paid his mother interest on this note and that it was endorsed on the back of this note in his uncle's presence, and that one of those occasions was in 1911. Mrs. Caroline E. Covey died in California the day before Thanksgiving, 1907. About ten days later, the will of said Caroline E. Covey was read by Charles Hazelhurst, an attorney, in appellants home. There were also present M. E. Covey, his brother H. E. Covey appellee and her son and her daughter. The will created some dissatisfaction in the mind of at least M. E. Covey and perhaps also of H. E. Covey. The will gave appellee \$2,000 more than the other children. M. E. Covey said that the understanding had been that appellee was to have \$1,000 more because Caroline E. Covey had lived with appellee for several years, and said that his share of the estate would be hardly enough to pay appellees note. He said the amount was \$2,000. She said it was \$3,300. Hazelhurst produced the note here sued on and M. E. Covey conceded that it was \$3,300. It was suggested that, inasmuch as his mother, who appears to have signed the note as security, was dead, M. E. Covey should get another signer on the note. This he declined, saying that it was not necessary, as he intended to pay the note when it was due, which would have been the following March. This conversation is testified to by H. E. Covey, Shoonhoven and Miss Parks. If this were all the evidence, it would be absolutely clear that this is the signature of M. E. Covey or, if not, that he had repeatedly recognized this note as his and had made payments upon it and is bound by it. At the trial in the Probate Court, the administrator called appellee as his witness, and asked her what the consideration

thereof made on this note, and that his father and trans-
porter left for California the next day. He also testified
that he was present on two occasions when M. E. Covey paid
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on the back of this note in his uncle's residence, and that
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by Charles Hazelhurst, an attorney, in his private home.
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At the trial in the Probate Court, the administrator called
apellee as his witness, and asked her what the conversation

for the note was, and she testified that it was \$3,500 in cash, a considerable part of which she had had in the house for quite a long time, and \$1,000 of which had been paid to her by Howard B. Winnie in payment of a note which he owed her, and she named the source from which she received several other sums, but left quite a large sum concerning which she was not sure where she obtained it. On the trial in the circuit court these statements by appellee were proved by the defense, and the defense produced Winnie and he testified that he had never owed appellee but one note, and that was for a small sum, and that he never had paid her \$1,000; that shortly after the trial in the probate court, she came to his place of business in Chicago and told the witness that at that trial in the probate court her son had testified that she received \$1,000 of this money from Winnie, and that she had been obliged therefore to testify to the same thing, and she wanted Winnie to give her some kind of a paper to substantiate her testimony that she had paid her \$1000 upon the note; and he told her he could not do that because he was heavily in debt and this would get him in trouble with other creditors. His cross examination weakened the effect of his testimony. The defense also introduced the amount of appellee as a depositor in a bank, and showed that he had a small running account in the bank and frequently borrowed small sums from the bank, and that she had no large deposits therein, and that during the time when she had stated that she had this large sum of money in her house, she borrowed a small sum from the bank, and that she borrowed \$250. of the bank on the day the note here sued on is dated. Appellee testified in rebuttal that she made this loan to Winnie in 1902, and that he paid it to her in February 1907, in the sum of \$1,000 which was

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shortly before the date of the note sued on, and that he begged her not to tell any one that he had paid that \$1000 to her because he had other creditors who would be very much dissatisfied if they knew it, and that he was paying her because she had been a friend of his wife for 20 years. She testified that when she visited Winnie shortly after the trial in the probate court, it was to try to collect from him a note for \$270 which she held against him and stillholds, and that, during that conversation, she told him about her testimony that she had received \$1,000 from him, and asked him if he could find that old note for her, and that he said he had destroyed it, and that he felt very sorry that she had told of his paying her that sum, because he was in trouble with his creditors. She denied using the language which he attributed to her. She further testified that when she was suddenly called on the stand in the probate court, she did not have any memoranda of her transactions with her, and was mistaken in some of her statements then made; that at the time the note in suit was given, she held three prior notes against her brother, M. E. Covey, of \$500 each, which were then surrendered to him, and she loaned him \$2,000 in cash and took the note in suit and that she had had that money in the house for some little time; that \$1000 of it she received from Winnie the previous month, and she gave the sources from which the other money was received. She testified to facts showing that she was a person of some little means; that besides her dwelling house she had four houses in Elgin which rented at from \$22 to \$25 per month and that, in settlement of controversies between herself and her former husband, Shoonhoven, she had been paid \$5,000 by him; and she showed receipts of money from some other sources.

It was for the jury to determine whether to believe

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 her former husband, Sheehovner, she had been paid \$2,000 by
 him; and she showed receipts of money from some other sources.
 It was for the jury to determine whether to believe

Winnie or appellee, and we see no reason to disturb the conclusion of the jury to believe appellee. The fact that appellee testified differently in the probate court from what she did in the circuit court as to the consideration of the note in suit and that the moneys which she claimed to have loaned her brother had not been deposited in the bank, though she had a bank account, and that she borrowed a small sum at the bank when she claimed to have this large sum in the house, are all circumstances to be considered by the jury in determining whether to believe her testimony, and if her testimony stood alone, these circumstances might create great doubt of its truth. But there are so many witnesses who testify to the genuineness of the signature of M. E. Covey to this note and to his having made one payment on the principal and three payments of interest with the note present and the payment endorsed on this note in his presence and so many who testify to his recognition of and promise to pay this note when his mother's will was read, that we conclude that the verdict of the jury, not only cannot be disturbed upon this evidence, but probably is a correct decision of the controversy.

Appellant offered in evidence a tax schedule of appellee in 1911 and it was not admitted, and it is argued that this was error. The schedule is not in the bill of exceptions. As it is not before us, we have no means of knowing that its refusal worked any injury to appellant. The court did admit the personal property assessment of appellee for the years 1907 and 1908. It seems that these schedules were in a large bound book which was supposed to have been sealed before it went to the jury room. When the jury returned into court there was found among the documents which they brought in two blank tax schedules, and it is argued that

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the presence of these blanks in the jury room was reversible error. How they got there is unknown. The attorneys on each side purged themselves of any blame for it. Probably they were inside of the book and in some way got out while they were in the jury room. We find nothing in these blanks which could have prejudiced appellant.

It is contended that the court erred in giving the second instruction requested by appellee. It was to the effect that if the jury believed from the evidence that the deceased executed and delivered this note to appellee in his lifetime and that it has not been paid, they should find for appellee for such an amount, if any, as from the evidence the jury ~~found~~ find due upon the note. It is argued that this erroneously omits the consideration; that deceased might have signed and delivered this note, and yet not have received any consideration for it. No such defense was interposed in fact, but, as the instructions only authorized a verdict for appellee in such an amount, if any, as from the evidence the jury found due upon it, this only authorized a verdict for what deceased owed upon the note and, if he owed nothing, it authorized no verdict for appellee.

A judge of the circuit court had been counsel for appellee before he became such judge, and during the trial in the circuit court he came into the court room and went upon the bench and spoke to the presiding judge for a short time. In a very blind way the motion for a new trial claimed that this was prejudicial to appellant. It was not shown how long this judge was with the presiding judge, nor that his visit upon the bench had any connection with the case on trial, nor that it was or could have been prejudicial to appellant.

We find no reversible error in the record. The judgment is affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

✓ Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 286

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6060.

Illinois Northern Utilities Company,
appellant.

vs Appeal from Ogle.

City of Oregon, appellee.

Dibell, J.

~~For very many years there has been a dam across the Rock River at the city of Oregon in Ogle County, In 1883 it was owned by John B. Mix, George A. Mix and Mary J. Mix Jr. They made various conveyances by which interests in that dam and waterpower passed to other persons, so that when this suit was begun, on February 13, 1914, the Illinois Northern Utilities Company ^{acquired} owned 107/110 thereof ^{a dam across the Rock River at the City of Oregon} the City of Oregon 2/110 thereof and the estate of James Barden 1/110 thereof. In all the deeds ~~executed by the members of the Mix family and their grantees, down to the present owners~~ there have been ^{made} numerous covenants and agreements for the repairing and maintaining of said dam to ^{such} a height as ^{as far} will furnish a head of five and one-half feet ~~when the water in Rock River is at a low stage, and for dividing the expense of repairing and maintaining said dam among the various owners in proportion to the shares which they may from time to time own in said dam and water and the waterpower created by said dam; and such expenses are charged as a first and prior lien on the shares and interest of each owner therein.~~ It was ther in provided that if any of the owners fail promptly to repair any damages said dam may sustain, within ten days after receiving notice to repair from any one interested therein, (the season of high water reasonably permitting such repairs to be made,) it shall be lawful for ^{or} any person owning an interest in said dam, ~~water and water-power,~~ to proceed immediately to repair the same and to charge~~

Illinois Northern Utilities Company,

Appellant.

Appeal from Ogle.

vs

City of Oregon, Appellee.

Dibell, J.

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to each party his proportion of the expense thereof. ~~There was much precise language in each of these deeds to carry these provisions into effect and to make them bind any subsequent purchaser of any interest in said dam. The spillway of the dam is about 775 feet long. In March 1913, the ownership being the same as above stated, about 100 feet of the dam went out. Nothing having been done to repair it, the City of Oregon in the month of October 1913, notified the Illinois Northern Utilities Company to repair the dam. It failed to do so. Thereupon the city of Oregon obtained bids and let a contract for the repair thereof to Henry Maffioli and the work was begun. The Illinois Northern Utilities Company then filed the original bill in this case against the city and Maffioli to enjoin the work, and had a temporary injunction without notice. The city then moved to dissolve the injunction for want of notice and for want of equity in the bill. The parties then entered into a stipulation that the complainant would construct a new dam across the river at or as near as practicable to the location of the present dam during the year 1914, and that the city should have the same pro ortionate ~~xxxxx~~ interest in said dam and the water-power created thereby as in the present dam, and that the complainant would pay ~~xx/xx~~ 54/55 of all damages sustained by Maffioli; and that, if by the first of August, 1914, the actual work of constructing the dam had not been entered upon, the defense should have a right to insist upon the hearing of said motions; and that when the new dam was constructed, complainant should have a perpetual injunction. Complainant prepared plans for a new dam. It has never done anything further. Its excuse is that the European War made it impossible to procure the money with which to build it. Thereupon, on October 23, 1914, complainant filed a sup-~~

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 or as near as practicable to the location of the present dam
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 same pro rata interest in said dam and the water-
 power created thereby as in the present dam, and that the
 complainant would pay \$24,250 of all damages sustained
 by Maffiolet; and that, if by the first of August, 1914, the
 actual work of construction of the dam had not been entered
 upon, the defendant should have a right to insist upon the
 hearing of said motion; and that when the new dam was
 constructed, complainant should have a proportional injunction.
 Complainant prepared a new dam. It has never done
 anything further. Its excuse is that the European war made
 it impossible to procure the money with which to build it.
 Thereupon, on October 22, 1914, complainant filed a sup-

~~plemental bill, setting up the stipulation and its inability~~
~~to build the new dam.~~ The city answered, and ^{after} there was a hearing ^{was denied}
of the cause and a decree dismissing the bill for want of
equity, and this is an appeal by the complainant therefrom.

~~The proofs show and the brief by appellant admits that~~
~~the city was within its legal rights in proceeding to repair~~
~~the dam.~~ But appellant contends that the dam is exceedingly
old and weak and full of holes and that it cannot be suc-
cessfully repaired, and that when this break is closed up
so much greater pressure will be put upon other parts of the
dam that it will go out at some other place, and that this
attempted repair will therefore be entirely useless, and that,
as nearly all the expense of the repair will be put upon
appellant, it ought in equity to be relieved from the ex-
pense of having this dam repaired at all; and it asserts
that if the matter be allowed to stand as it is until fin-
ancial conditions improve, it will build a new dam. There
is evidence that an executive officer of the company
has declared to agents of the city that the complainant would
not rebuild the dam at all, but would allow it to be destroyed.
There is evidence by experts, ^{as to condition} ~~called by appellant,~~ ^{which is} ~~that this~~
~~dam is so old, weak and dilapidated that it cannot be so~~
~~repaired as to make it a useful dam.~~ ^{could not} ~~There is evidence~~
~~for the defendant by persons who have repaired this dam~~
~~in former years that it can be repaired so as to be a useful~~
~~dam.~~ The city had contracted for the closing of this washout
with what is known as "rock crib" construction; and it proved
that a former leak elsewhere in the dam was repaired and
closed with that construction, and that it still remains
in the dam in a sound and effective condition. ~~The chancellor~~
~~heard the witnesses in open court. We are unable to demonstrate~~
~~or say that from all this evidence he ought to have found~~

The evidence in this case is that the dam is old and weak and full of holes and that it cannot be successfully repaired, and that when this break is closed up so much greater pressure will be put upon other parts of the dam that it will go out at some other place, and that this attempted repair will therefore be entirely useless, and that a nearly all the expense of the repair will be put upon the dam itself, it ought in equity to be relieved from the expense of having this dam repaired at all; and it asserts that if the matter be allowed to stand as it is until final conditions improve, it will build a new dam. There is evidence that an executive officer of the company has declared to agents of the city that the complainant would not rebuild the dam at all, but would allow it to be destroyed. There is evidence by experts, called by complainant, that this dam is so old, weak and dilapidated that it cannot be so repaired as to make it a useful dam. There is evidence for the defendant by persons who have repaired this dam in former years that it can be repaired so as to be a useful dam. The city had contracted for the closing of this cañon with what is known as "rock crib" construction; and it proved that a former leak elsewhere in the dam was repaired and closed with that construction, and that it still remains in the dam in a sound and effective condition. The defendant calls the witness as its own witness. It was unable to demonstrate any fact from all this evidence in support of its claim.

that this dam cannot be so repaired as to make it effective. The chancellor believed those who had had actual experience in successfully repairing this dam in former years, rather than the theories advanced by others. No one can absolutely know whether, when this break is closed, the rest of the dam will withstand the pressure. It is a matter of opinion only and we are unable to say that the chancellor erred in accepting the opinions of those who had actually repaired the dam in former years.

The decree is therefore affirmed.

that this can cannot be so regarded as to make it effective.
The Chancellor believed those who had had actual experience
successfully rejecting this law in former years, rather
than the theories advanced by others. No one can absolutely
know whether, when this break is closed, the rest of the day
will withstand the pressure. It is a matter of opinion only
and we are unable to say that the Chancellor acted in accept-
ing the opinions of those who had actually rejected the law

in former years.

The decree is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present -- The Hon. DUANE J. CARNES, Presiding Justice

Hon. DORRANCE DIBELL, Justice

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff

193 I.A. 288

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A.D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

193/288

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on 5790

5790

HERBERT HAENTZKE and CHARLES M. WICKLER,
Co-Partners as HAENTZKE & WICKLER,

Appellees,

vs.

JOSE SWAIN BROWN and PHILIP S. BROWN,

Appellants,

APPEAL FROM DUPAGE

Lehaus, J.

In this case the appellees filed a bill in Chancery, to foreclose a mechanic's lien against the property of appellants. The bill alleges, that the lien accrued to appellees because the appellants failed to pay the balance due for work done and material furnished by appellees, in the building of a dwelling house for appellants, on the premises described in the bill. The bill also alleges, that the work was done, and materials furnished, by appellees under a written building contract, executed by the parties; also, that there were extras furnished by appellees. The bill prays, that an account may be taken of the matters alleged in the bill, and the amount due ascertained; and, that a decree may be rendered directing the foreclosure of the lien.

Appellants filed an answer to the bill, admitting the execution of the contract, but denying, that the house was completed; and admitting, that the appellants took possession of the house. They also deny, that there was anything due appellees; claiming, that appellees were indebted to them in the sum of \$423.59. They also aver, that the house was

not constructed in accordance with the plans and specifications, as required by the contract; and, that the work was done unskilfully, and in an unworkmanlike manner; and that the materials used in the construction of the house were defective; and that the construction was improper; and that the appellants are entitled to certain credits. Also, that appellees failed to have the house ready for occupancy by August 1, 1910, as required by the contract; and claiming a credit of \$500.00, as liquidated damages under the provisions of the contract.

The appellants also filed a cross bill, alleging that appellees entered into the contract set up in the original bill, to build the house in question for appellants, in accordance with plans and specifications prepared by Clarence Hatzfeld; and that they agreed to finish the house by August 1, 1910; and that appellees did not construct the house as required by the plans and specifications, in various particulars, set forth in the cross bill; and that the work was done in an unskilful and unworkmanlike manner; and that it was not completed as required by the contract; the delay being caused by the carelessness of appellees; and that, consequently, the appellees became liable to appellants for the sum of \$500.00 liquidated damages, provided for in said contract; that the appellees were to grade the lawn, and lay sidewalk and a driveway; but that appellants did this; and paid out the sum of \$121.53 on

that account, for appellees; that appellants have a total claim of \$1024.68 against appellees' claim of \$606.59; leaving a balance due appellants of \$418.09. The cross bill also prays, that an account may be taken by the Court, of the amount due appellants; and that the appellees may be decreed to pay such amount to appellants; and that the claim for lien filed by appellees may be held void, etc.

The appellees, by leave of Court, filed an amended bill, which recites the making of the contract between the parties, and alleges that appellees commenced work on the house in question the latter part of April, 1910; and completed it on December 16, 1910, in accordance with the written contract; but making such changes in the original plans and specifications, as were requested by appellants; and that appellees furnished the necessary material and labor therefor; that the original contract price was \$4550.00; but that the appellants had requested numerous changes and extras, which appellees furnished, at an agreed price of \$1305.22; and that they also furnished other extras for the building, which were ordered by appellants; that the contract provides for the payment of all plumbing by appellants, and that on March 3, 1911, appellees filed a statement and claim of lien; and that through inadvertence and misunderstanding of the facts and circumstances, and by mistake, appellees omitted certain items from said bill for lien, viz: For

plumbing, \$709.00 and \$46.85; that appellants accepted all of the improvements made by appellees; and that there is due to appellees the sum of \$1077.51.

The appellees filed an answer to the cross bill of appellants, in which they deny the allegations of the cross bill, relative to improper and defective construction of the house in question; and deny the use of deficient or defective material; and deny, that the appellants are entitled to the credits claimed in the cross bill; and deny, that the failure to complete the house at the time specified, was on account of their neglect or carelessness; aver that the time for completion, had been waived by appellants; and that, therefore, the appellants are not entitled to the liquidated damages claimed.

A motion was made to strike the amended bill from the files, which was denied by the Court. The appellants, also, filed an amendment to their answer to the amended bill, in which the appellants specify other defects in materials, and deficiencies in construction; also denying, that the plumbing items were left out of the original bill and the claim of lien filed, by mistake. Another amendment to the amended answer was also filed, in which more defects in construction are specified. The appellants also filed an amendment to their cross bill, alleging fraud and carelessness on the part of appellees, in not complying with the plans and specifications for the building of the house in question.

The pleadings having been settled, the case proceeded to a hearing before the Court, concerning the matters in issue; and the Court took an account of these matters, and found that all of the material allegations contained in the amended bill of complaint, were true; that the sum of \$700.00 was due to appellees; and that they were entitled to a lien therefor; and entered a decree of foreclosure of such lien, and dismissing the cross bill of appellants, for want of equity. From this decree the appellants appealed, and brought the cause to this Court for review.

The appellants assert in their brief, that the only matters in dispute between the parties, are "whether or not the house was erected in substantial compliance with the contract and specifications; whether or not the defendants, with knowledge of all the facts, accepted the house as completed, and agreed to pay the balance; and whether or not the items for plumbing, which forms a large part of the claim, which was allowed, ~~were~~ omitted from the original bill by mistake, as set forth in the amended bill of complaint".

It was not necessary to make a showing to the Court, that the plumbing items were omitted from the original bill by mistake or inadvertence, in order to entitle the appellees to an amendment of their bill of complaint; nor was it necessary to make such a showing on the hearing of the cause. Amendments to bills in Chancery, which are not

sworn to, enlarging their scope, are allowed by Courts with great liberality, until the proofs are closed, and almost as a matter of course. (Fowler vs. Fowler, 204 Ill. 82.)

As to whether the house in question was built in substantial compliance with the contract and the specifications, is a matter which must be determined from the evidence. The evidence upon this point is somewhat conflicting; and, therefore, the weight to be given to the testimony of the different witnesses who testified, becomes an important question; and one that the Chancellor, who saw and heard the witnesses testify, is best able to decide. We think the evidence fairly tends to prove, as the Chancellor found, that there was a substantial compliance with the contract. But even if the evidence were in irreconcilable conflict, it would not authorize a disturbance of the decree. (Shoop vs. Shoop, 115 Ill. App., 346.)

It clearly appears that the specifications, in a general way, were carried out; there were important changes made by appellants; also additions to the construction as originally designed. Some changes were made even after the date fixed for the completion of the house; and after the appellants had taken possession. And it is true, that there were some deviations from the strict letter of the specifications, in the details of construction; and some deficiencies and defects in the

materials used; and in the work done; but none of these are of such a substantial character, as to affect the general character of the work. Literal compliance with the provisions of a contract is not essential to a recovery. It will be sufficient if there has been an honest and faithful performance of the contract, in its material and substantial parts, and no wilful departure or omission of essential points of the contract." (Bloomington Hotel Co. vs. Garthwait, 227 Ill. 630; Peterson vs. Pusey, 237 Ill. 204; Erikson vs. Ward, 266 Ill. 259.)

If the appellants suffered any damages because of the minor deficiencies and defects in material used, by the deviations from the exactness of construction in the building, they had the right to have such damages recouped against the balance due to appellees; and whatever damages were proven upon the hearing, in that regard, were undoubtedly taken into consideration by the Court, in arriving at the state of the account between the parties, and in ascertaining the balance due the appellees. If any damages were suffered by appellants, which they did not prove at the hearing of the case, it is not a matter which can now be reviewed by this Court.

It is insisted by the appellants, that they are entitled to a credit of \$500.00 for liquidated damages, which the Court refused to allow. It is claimed under the clause in the contract by which the appellees

agreed to have the house in question "completely finished and ready for use or occupancy on the first day of August, A. D. 1910, weather and other conditions permitting". It will be noticed that the agreement to finish by August first, is not unconditional; but is expressly based upon the contingency, that the weather conditions and other conditions did not delay the work. There is evidence in the record to show, that weather conditions did delay the work; also, that the work was delayed by the changes in, and additions to, the plans and specifications, which were made at the instance of appellants.

The evidence also shows, that the appellants took possession of the house in question, about August 30th, after the date fixed for its completion; and urged appellees to proceed to finish the same; and to continue to furnish work and materials, and expend money for the purpose of completing the same for appellants; and that appellees did so; and that appellants accepted the benefits of the work, and the materials furnished by the appellees, as they were furnished; and then met with appellees, and practically agreed upon the amounts due them; and upon the credits to which appellants were entitled; and that thereupon the appellants made a payment of \$350.00 on the account. Under these circumstances, the liquidated damages stipulated in the contract, though afterward claimed by appellants, cannot legally be exacted; and are

waived. (Ryster vs. Parrott, 83 Ill. 517; Hart vs. Carsely Mfg. Co., 116 Ill. App. 159; Stroebe Steel Construction Co. vs. Sanitary District, 160 Ill. App. 554; Bloomington Hotel Co. vs. Garthwait, 227 Ill. 630.)

The case of Ryster vs. Parrott, above referred to, in its equitable features, was very similar to this case, and the language used by the Court is quite applicable here. The Court says:

"Appellant insists upon the entirety of the contract, and that, having failed to perform, appellee had no right to recover at all. We think the Circuit Court took the correct view of this matter. It is true, that appellee did not comply with his contract as to time; but, after he was in default in this regard, the appellant made partial payments to him, and urged him to go on with the work, and he did go on, and expended money in work and materials to a considerable amount. This was a waiver by appellant of her right to demand, on account of such failure, a forfeiture of appellee of the work he had done. In good conscience, appellant ought to pay what the work actually done, in the manner and at the time it was done, was reasonably worth to appellant, taking the contract price for the rate at which to value the work done."

We perceive no error in the decree in this case; and it should be affirmed.

Carnes, Presiding Justice, took no part.)

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of July, in the year of our Lord one thousand nine hundred and sixty -one

Paul V. Wunder
Clerk of the Appellate Court.

5917

612

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 291

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5917

People of the State of Illinois.

Defendant in error.

vs

Error to Co. Ct. Bureau

John Romani, Plaintiff in error.

Niehaus, J.

In this case an information was filed by the States Attorney, in the County Court of Bureau County, charging the plaintiff in error, Hohn Romani, with violating Section 2 of the Dram Shop Act, by selling intoxicating liquors in less quantity than one gallon, without a license. There were 72 counts in the information; three of which, namely the 69th, 70th and 71st, also contained the charge, that the plaintiff in error was violating Section 7 of the Dram Shop Act, by keeping a public nuisance.

It was alleged in the 69th count, that the plaintiff in error #on Lot Number Sixteen in Block Number One in Smithe Subdivision of part of the South half of Section thirty six Township sixteen, north range ten, east of the fourth principal meridian, did keep a certain room, the said room then and there being a place of public resort," etc.

There was a trial by jury, and the jury returned a verdict finding the plaintiff in error guilty on thirty two counts, for selling liquor without a license; and also finding him guilty, on the 69th. count, for keeping a resort which was a nuisance.

A motion for new trial was made; also a motion in arrest of judgment; and both motions were denied by the court. The court thereupon sentenced the plaintiff in error to pay a fine of \$100.00 upon the 69th. count of the information; and to be imprisoned in jail for a period of 50 days.

Gen. No. 5317
People of the State of Illinois.
Defendant in error.
Error to Co. Ct. Bureau
John Roman, Plaintiff in error.
Nichols, J.
In this case an information was filed by the State
Attorney, in the County Court of Bureau County, charging
the plaintiff in error, John Roman, with violating Section
8 of the Dram Shop Act, by selling intoxicating liquors in
less quantity than one gallon, without a license. There
were 73 counts in the information; three of which, namely
the 63th, 70th and 71st, also contained the charge, that
the plaintiff in error was violating Section 7 of the Dram
Shop Act, by keeping a public nuisance.
It was alleged in the 63th count, that the plaintiff in
error was keeping a public nuisance in Block Number One in Smith's
Subdivision of part of the South half of Section thirty six
Township sixteen, North range ten, east of the fourth prin-
cipal meridian, did keep a certain room, the said room then
and there being a place of public resort, etc.
There was a trial by jury, and the jury returned
a verdict finding the plaintiff in error guilty on thirty
two counts, for selling liquor without a license; and also
finding him guilty, on the 63th count, for keeping a
resort which was a nuisance.
A motion for new trial was made; also a motion in
arrest of judgment; and both motions were denied by the
court. The court thereupon sentenced the plaintiff in error
to pay a fine of \$100.00 upon the 63th count of the infor-
mation; and to be imprisoned in jail for a period of 30 days.

The court also ordered, that the place kept by said plaintiff in error, to-wit, "a certain room on Lot number 16 in block number 1, in Smith's Subdivision, etc. the said room then and there being a place of public resort", be shut up and abated until the said John Romani gave bond in the penal sum of \$1,000. conditioned that he would not sell any intoxicating liquors contrary to law, and would pay all fined, costs and damages assessed against him for any violation of law in that regard. The Court also sentenced the plaintiff in error to pay a fine of \$20.00 on each of the 32 counts upon which the jury had returned a verdict of guilty; and, that he stand committed until the fine and costs were paid. A writ of error was then sued out, and the case brought to this court for review.

One of the errors complained of is, that the description of the place of the nuisance is not sufficiently certain. The objection in this regard is not well taken. A similar description of a place found to be a nuisance, was held sufficient by this court in *People v Shook*, 175 Ill. App. 53.

But it is also contended, that the evidence in this case, does not positively show, that the drinks sold were intoxicating. And it is true that there were some witnesses who testified merely, that the beer which they purchased was "supposed to be lager beer", and looked and smelled like lager beer; and there was also some of the testimony to the effect that it was thinner than the beer usually sold in saloons; and that it was "temperance beer" or "Near-beer". Testimony of this character, standing alone is, of course, insufficient to sustain a conviction on a charge of selling intoxicating liquor. There was some

The court also ordered, that the place kept by said plaintiff in error, to-wit, "a certain room on lot number 16 in block number 1, in Smith's Subdivision, etc., the said room then and there being a place of public resort", be shut up and sealed until the said John Rowan gave bond in the penal sum of \$1,000, conditioned that he would not sell any intoxicating liquors contrary to law, and would pay all fines, costs and damages assessed against him for any violation of law in that regard. The Court also sentenced the plaintiff in error to pay a fine of \$20.00 on each of the 36 counts upon which the jury had returned a verdict of guilty; and, that he stand committed until the fines and costs were paid. A writ of error, was then set out, and the case brought to this court for review.

One of the errors complained of is, that the description of the place of the nuisance is not sufficiently certain. The objection in this regard is not well taken. A similar description of a place found to be a nuisance, was held sufficient by the court in *People v. Brock*, 175 Ill. App. 53.

But it is also contended, that the evidence in this case, does not positively show, that the plaintiff sold wine intoxicating. And it is true that there were some witnesses who testified merely, that the beer which they purchased was "supposed to be lager beer", and looked and smelled like lager beer; and there was also some of the testimony to the effect that it was thinner than the beer usually sold in saloons; and that it was "a poor beer" or "near-beer". Testimony of this character, standing alone is, of course, insufficient to sustain a conviction on a charge of selling intoxicating liquor. There was some

testimony given in the case, however, which appears to be sufficiently positive to show that intoxicating liquors, had been sold in the place in question; and we think, this positive testimony is sufficient to support a verdict of guilty; though it is not clear, that it is sufficient to sustain the verdict on all of the 33 counts. On account of the other questions involved, however, it will not be necessary to go into a detailed discussion of this feature of the case.

Incidental to the main inquiry, as to the sale of intoxicating liquors, and the keeping of a nuisance, the plaintiff in error was interrogated as to his marriage to Clementina Romani, whom he claimed, as his wife, and testified that he was married to her at LaSalle, Illinois, about 5 years before that time; that he had previously obtained a license therefor, in Bureau county. A deputy county clerk of Bureau County, Frieda O. Nelson, was called as a witness in rebuttal, and without objection testified, that she had made an examination of the records of marriage licenses issued in Bureau County, within the eight years past; and that, from such examination she could state, that no person by the name of John Romani, had made an application for a marriage license in said county. After the trial the witness admitted, and verified the admission by an affidavit, that she was mistaken in her testimony; that there was a record showing the issuance of a license to the plaintiff in error, on August 4, 1910, to marry Clementina Boggi. It cannot be doubted that this erroneous testimony by the deputy county clerk, strongly reflected upon the veracity of the plaintiff in error, and introduced into the case an element which must have affected the weight to be given to his evidence by the jury. It placed the plaintiff in error in the light

testimony given in the case, however, which appears to be
sufficiently positive to show that intoxicating liquors,
had been sold in the place in question; and we think, this
positive testimony is sufficient to support a verdict of
guilt; though it is not clear, that it is sufficient to
sustain the verdict on 11 of the 32 counts. On account of
the other questions involved, however, it will not be neces-
sary to go into a detailed discussion of this feature of the
case.

Incidental to the main inquiry, as to the sale of
intoxicating liquors, and the keeping of a nuisance, the
plaintiff in error was introduced as to his marriage to
Clementine Roman, whom he claimed, as his wife, and tes-
tified that he was married to her at LaSalle, Illinois, about
5 years before that time; that he had previously obtained
a license therefor, in Bureau county. A deputy county clerk
of Bureau County, Freda O. Wilson, was called as a witness
in rebuttal, and without objection testified, that she had
made an examination of the records of marriage licenses
issued in Bureau County, within the eight years past; and
that, from such examination she could state, that no person
by the name of John Roman, had made an application for a
marriage license in said county. After the trial the witness
submitted, and verified the admission by an affidavit, that
she was mistaken in her testimony; that there was a record
showing the issuance of a license to the plaintiff in error,
on August 4, 1910, to marry Clementine Boggs. It cannot be
doubted that this erroneous testimony by the deputy county
clerk, strongly reflected upon the veracity of the plaintiff
in error, and introduced into the case an element which
must have afforded the weight to be given to his evidence
by the jury. It placed the plaintiff in error in the light

of having given false testimony; also brought to the jury the inference, that he was living in an open state of adultery.

The credibility of the testimony of the plaintiff in error, in this case, was a very material matter. There was evidence tending to show that Clementina Tomani was the keeper of this resort; there was also evidence tending to show that the plaintiff in error was the keeper. There was evidence tending to show, that at least some of the beer sold by the plaintiff in error, was "near beer". And the plaintiff in error, when called as a witness in his own behalf testified positively that his wife was the keeper and "boss" of this place; that she had owned the bar fixtures and furniture in the place, before their marriage; that the beer which was sold by him, was sold as agent for his wife; and that he did not sell anything but "Near-beer". It will be seen that the credibility of the plaintiff in error with reference to the question of his guilt or innocence, was one of the important matters to be determined by the jury in the case; the extent of his guilt, at least, had to be determined practically with reference to his credibility as a witness, in connection with the other evidence in the case. Under these circumstances, the mistake in the testimony of Frieda O. Nelson, and the damaging effect it must have had, brings the case clearly within the rule laid down by the Supreme Court, in *People v. Pezutto* 255 Ill. 583, concerning the effect of mistakes made by witnesses in their testimony. And upon the showing made by plaintiff in error, on the motion for a new trial, of the discovery of the mistake of the deputy county clerk in her testimony, the court should have granted a new trial.

We are also of opinion, that the court should have given the 4th. instruction requested by the plaintiff in error.

Having given false testimony, also brought to the jury the inference, that he was living in an open state of adultery. The credibility of the testimony of the plaintiff in error, in this case, was a very material matter. There was evidence tending to show that Clementine Toomey was the keeper of this resort; there was also evidence tending to show that the plaintiff in error was the keeper. There was evidence tending to show, that at least some of the beer sold by the plaintiff in error, was "near beer". And the plaintiff in error, when called as a witness in his own behalf testified positively, that his wife was the keeper and "does" this place; that she had owned the bar fixtures and furniture in the place, before their marriage; that the beer which was sold by him, was sold as agent for his wife; and that he did not sell anything but "Near-beer". It will be seen that the credibility of the plaintiff in error with reference to the question of his guilt or innocence, was one of the important matters to be determined by the jury in the case; the extent of his guilt, at least, had to be determined, factually with reference to his credibility as a witness, in connection with the other evidence in the case. Under these circumstances, the mistake in the testimony of Fritzsche, Nelson, and the damaging effect it must have had, brings the case clearly within the rule laid down by the Supreme Court, in People v. Perotto 255 Ill. 583, concerning the effect of mistakes made by witnesses in their testimony. And upon the showing made by the plaintiff in error, on the motion for a new trial, of the discovery of the mistake of the deputy county clerk in her testimony, the court should have granted a new trial.

We are also of opinion, that the court should have given the 4th. instruction requested by the plaintiff in error.

This instruction was proper and applicable, in directing the jury's attention to the necessity of sufficient proof that the beer sold, was intoxicating beer; and not "root-beer" or other beers, which are known to be non-intoxicating. The accused has a right to have the jury instructed with substantial accuracy, as to the law applicable to the case. (Hoge v People 117 Ill. 35.)

For the errors indicated the judgment of the county court of Bureau County, should be reversed, and the cause remanded for another trial.

Reversed and remanded.

This instruction was proper and applicable, in directing the jury's attention to the necessity of sufficient proof that the beer sold, was intoxicating beer; and not "root-beer" or other beers, which are known to be non-intoxicating. The accused has a right to have the jury instructed with substantial accuracy, as to the law applicable to the case.

(Hoge v People 117 Ill. 35.)

For the errors indicated the judgment of the county court of Bureau County, should be reversed, and the cause remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. } I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

5983

613

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

193 I.A. 293

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5983

Carl Swanson, et al appellants.

vs

Appeal from Rock Island.

John F. Rose et al appellees.

Nischaus, J.

This is an action on the case brought in the Circuit Court of Rock Island County, by the appellants, against the appellees, John F. Rose, Coroner of said County, and August H. Arp, a physician, to recover damages for paid and anguish of mind, caused by an autopsy alleged to have been wrongfully performed, whereby the body of a deceased brother of appellants was "cut, hacked and mutilated" by opening the abdomen, and removing portions thereof, etc. The original declaration was filed December 4, 1911; and the appellees filed a general demurrer to the same, which was sustained by the court. General leave was then given to appellants to amend.

On June 25, 1913, appellants filed an amended declaration, to which appellees filed a general and special demurrer. The demurrer and some of the special causes of demurrer, were sustained by the Court, on January 14, 1914; and the court thereupon entered an order dismissing the suit, at appellants costs.

On April 3, 1914, during the same term at which the order of dismissal was entered, appellants filed a motion to set aside the order dismissing the suit; to reinstate the cause on the docket; and to allow appellants to file a second amended declaration, a copy of which was attached to the motion. This motion was denied, on the 4th. day of April 1914; and appellants thereupon prayed an appeal to this court.

The errors assigned on this appeal are as follows:

1. The court erred in denying plaintiffs motion to vacate the

1. The court erred in denying plaintiff's motion to vacate the
The errors assigned on this appeal are as follows:

and appellants thereupon prayed an appeal to this court.

tion. This motion was denied, on the 4th day of April 1914;
amended declaration, a copy of which was attached to the mo-
cause on the docket; and to allow appellants to file a second
to set aside the order dismissing the suit; to reinstate the
order of dismissal was entered, appellants filed a motion
On April 5, 1914, during the same term at which the

costs.
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was filed December 4, 1911; and the appellees filed a
removing portions thereof, etc. The original declaration
was "cut, hacked and mutilated" by opening the abdomen, and
performed, whereby the body of a deceased brother of appellants

of mind, caused by an autopsy alleged to have been wrongfully
H. Arp, a physician, to recover damages for pain and anguish
appellees, John T. Rose, Coroner of said County, and August
Court of Rock Island County, by the appellants, against the
This is an action on the case brought in the Circuit
Nichols, J.

John T. Rose et al appellees.

vs

Appeal from Rock Island.

Carl Swanson, et al appellants.

Gen. No. 5883

order dismissing their suit and denying their motion to reinstate said cause and grant leave to plaintiffs to file an amended declaration therein instanter.

2/ The court erred in dismissing plaintiffs suit at their costs.

3. The court erred in sustaining defendants demurrer to plaintiffs original declaration.

4. The court erred in sustaining defendants demurrer to plaintiffs amended declaration.

5. The court should have allowed plaintiffs motion to vacate order dismissing plaintiffs suit and should have reinstated said cause and granted leave to plaintiffs to file an amended declaration as proposed in their motion to that effect.

Concerning the third assignment of error, it may be said, that the appellants waived their right to insist upon the validity and sufficiency of the original declaration, when they obtained leave of court to file an amended declaration. (Retail Merchants Fire Ins. Co. v Coz, 138 Ill. App. 12; Maegerlein v Chicago, 237 Ill. 159.)

Passing to a consideration of the other errors assigned we find as to the amended declaration to which a demurrer was sustained, that while the record does not disclose, that the appellants elected to abide by this declaration, it must be presumed that they intended to do so; inasmuch as they took no steps from which an abandonment of it could be inferred; and they are therefore, in the same position as if they had formally indicated an intention to stand by this declaration. (Bennet v Union Central Life Co. 203 Ill. 444.) The amended declaration however, is not set out in the abstract and hence we are not required to examine it; and the abstract therefore, does not show any error in the court in dismissing the suit.

As to the action of the court in refusing to set aside

order dismissing their suit and denying their motion to
renew said cause and grant leave to plaintiffs to file
an amended declaration therein instant.

2. The court erred in dismissing plaintiffs' suit at their costs.
3. The court erred in sustaining defendants' demurrer to plaintiffs' original declaration.
4. The court erred in sustaining defendants' demurrer to plaintiffs' amended declaration.
5. The court should have allowed plaintiffs' motion to vacate order dismissing plaintiffs' suit and should have reinstated said cause and granted leave to plaintiffs to file an amended declaration as proposed in their motion to that effect.

Concerning the third assignment of error, it may be said, that the appellants waived their right to insist upon the validity and sufficiency of the original declaration, when they obtained leave of court to file an amended declaration. (Restatement Merchants Fire Ins. Co. v. Cos, 138 Ill. App. 18; Macgregor v. Chicago, 337 Ill. 152.)

Passing to a consideration of the other errors assigned as error to the amended declaration to which a demurrer was sustained, that while the record does not disclose that the appellants elected to abide by this declaration, it must be presumed that they intended to do so; inasmuch as they took no steps from which an abandonment of it could be inferred; and they are therefore, in the same position as if they had formally indicated an intention to stand by this declaration. (Barnett v. Union Central Life Co., 203 Ill. 444.) The amended declaration however, is not set out in the abstract and hence we are not required to examine it; and the abstract therefore, does not show any error in the court in dismissing the suit.

As to the action of the court in refusing to set aside

the order dismissing the case, and denying leave to file a seconded amended declaration, it may be reasonably presumed that some showing was made for and against the allowance of this motion, which was made nearly three months after the case had been dismissed; but such showing, whatever it may have been, is not preserved in the bill of exceptions; and in the absence of any record of what showing was made, it must be presumed that the Court acted properly in denying the motion and refusing to reinstate the case. It may be here emphasized, too, that the written motion, and the attached paper, purporting to be an amended declaration, cannot be considered in this case, because they are not a part of the record; not having been embodied in the bill of exceptions. Any written motion, in an action at law, must be embodied in the bill of exceptions, to preserve it as a matter of record. (People v Taxman 186 Ill. App. 348.) For the reasons stated the judgment must be affirmed.

Judgment affirmed.

the order dismissing the case, and saying leave to file a second amended declaration, it may be reasonably presumed that some showing was made for and against the allowance of this motion, which was made nearly three months after the case had been dismissed; but such showing, whatever it may have been, is not preserved in the bill of exceptions; and in the absence of any record of what showing was made, it must be presumed that the Court acted properly in denying the motion and refusing to reinstate the case. It may be here emphasized, too, that the written motion, and the attached paper, purporting to be an amended declaration, cannot be considered in this case, because they are not a part of the record; not having been embodied in the bill of exceptions. Any written motion, in an action at law, must be embodied in the bill of exceptions, to preserve it as a matter of record. (People v. Taxman 186 Ill. App. 348.) For the reasons stated the judgment must be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

615

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice. 193 I.A. 301

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5992.

J. R. Kepple et al appellants.

vs

Appeal from Knox.

Philip Stoddard, appellee.

Niehaus, J.

This was a suit in assumpsit, commenced in the circuit court of Knox County, to recover an alleged balance due as part of the purchase price of a horse, which appellee claimed he sold and delivered to appellants. The appellants deny, that the sale was consummated; and insist that the horse was never delivered to them; and that, therefore, they are not liable. The case turns mainly upon this question of delivery. The parties agree that a bargain was made for the horse in question, in August 1911; and that the purchase price was \$95.00 and that, according to the bargain as originally made, the appellee was to drive the colt twice; and that he was to put a halter on him; and deliver him in a day or two. Appellee testified, that he went to town the morning after the bargain had been made; and there ~~xxx~~ met the appellant Kepple, who inquired if he, appellee, could pasture the horse; whereupon appellee replied, "I havent got any pasture. You will have to see the old man"; that appellant thereupon inquired where the old man was; and being informed that the old man was in town, he went to look for him; afterwards he came back and told appellee, that he had hired pasture of appellee's father, and was going to leave the horse out there; and would get him there, when he wanted him; that in this way, the horse was left in the pasture of appellee's father, W. F. Stoddard, where, in the following month of October, he was hurt by coming in contact with a wire.

by coming in contact with a wire.
Stoddard, where, in the following month of October, he was hurt
horse was left in the pasture of Appellee's father, W. W.
set him there, when he wanted him; but in this way, the
father, and was going to leave the horse out there; and would
and told Appellee, that he had hired pasture of Appellee's
was in town, he went to look for him; afterwards he came back
where the old man was; and being informed that the old man
have to see the old man; that Appellant hereupon informed
upon Appellee replied, "I haven't got any pasture. You will
who inquired if he, Appellee, could pasture the horse; where-
gain had been made; and there was met the appellant Keple,
testified, that he went to town the morning after the bar-
halter on him; and deliver him in a day or two. Appellee
Appellee was to drive the colt twice; and that he was to put
and that, according to the bargain as originally made, the
question, in August 1811; and that the purchase price was \$25.00
The parties agree that a bargain was made for the horse in
liable. The case turns mainly upon this question of delivery.
never delivered to them; and that, therefore, they are not
that the sale was consummated; and insist that the horse was
he sold and delivered to Appellants. The Appellants deny
part of the purchase price of a horse, which Appellee claimed
count of Knox County, to recover an alleged balance due as
This was a suit in assumpsit, commenced in the circuit
Nichols. J.

Phillip Stoddard, Appellee.

vs
Appel from Knox.

J. R. Keple et al Appellants.

Gen. No. 2932.

W. F. Stoddard, appellee's father, corroborated his son concerning the matter of pasturing the horse for appellants. He testified that he had a talk with appellant Kepple, in St-Augustine, in August; that Kepple wanted him to pasture the horse for him; and he finally agreed to do so, and told Kepple he might let him stay in the pasture. The appellant, Kepple denied that he saw appellee in town the next day after the bargain had been made; and denied also, that he had any conversation with the appellee, or with appellee's father, about pasturing the horse.

If it be a fact, that the appellant agreed with appellee and appellee's father, that appellee's father should hold the horse in question in his pasture, for the appellants, until appellants got ready to take him, then the delivery to appellants was completed by this transaction, which amounted to a transfer of the possession of the horse, from appellee to appellants.

The jury by rendering their verdict, in effect found the facts constituting the delivery, or the transfer of the possession, from appellee to appellants, to be as claimed by appellee. Whether the facts constituting the delivery were as testified by appellee, or the facts were as claimed by the appellants, was purely a question for the jury to pass upon, and not a question for the court to decide. The credibility of the witnesses who testify in a ~~xx~~ case, and the weight to be given to their testimony, are questions for the jury.

(Lowry v Orr, 1 Gilm. 69. Martin v Morelock, 33 Ill. 485; Chicago & A. R. Co. v Fisher, 141 Ill. 614; McGregor v Reid Murdock & Co. 78 Ill. 464.)

Appellants also complain, because the court below sustained an objection to a question put to appellant Clark

W. F. Stoddard, appellee's father, corroborated his son concerning the matter of pasturing the horse for appellee. He testified that he had a talk with appellant Kephle, in August, in August, in August; that Kephle wanted him to pasture the horse for him; and he finally agreed to do so, and told Kephle he might let him stay in the pasture. The appellant, Kephle, denied that he saw appellee in town the next day after the bargain had been made; and denied also, that he had any conversation with the appellee, or with appellee's father, about pasturing the horse.

It is a fact, that the appellant agreed with appellee and appellee's father, that appellee's father should hold the horse in question in his pasture, on the premises, until appellee got ready to take him, then the delivery to appellee was completed by this transaction, which amounted to a transfer of the possession of the horse, from appellee to appellee.

The jury by rendering their verdict, in effect found the facts constituting the delivery, or the transfer of the possession, from appellee to appellee, to be as claimed by appellee. Whether the facts constituting the delivery were as testified by appellee, or the facts were as claimed by the appellee, was purely a question for the jury to pass upon, and not a question for the court to decide. The credibility of the witnesses who testify in a case, and the weight to be given to their testimony, are questions for the jury.

(Howry v Orr, 1 Clm. 63. Martin v Kerslock, 33 Ill. 485; Chicago & A. R. Co. v Fisher, 141 Ill. 814; McGregor v Reid Murdoch & Co. 78 Ill. 444.)

Appellant also complains, because the court below sustained an objection to a question put to appellant Clark

about the ownership of land, at the time of this transaction, and because the court sustained an objection to a question asked of the appellant Kepple, as to what condition he and the appellant Clark were in, with reference to ~~ix~~ pasture, at the time of this transaction. We are of opinion that the objections to the questions were properly sustained in both instances. Upon their face, the questions asked, would have led to the raising of an immaterial issue in the case; and ~~ix~~ there was nothing in the appellant's offer to prove, which indicated that the answer which the witness might have made would be material on the real issue. To have merit, even as a circumstance, it was at least necessary, that the offer should have indicated, that the answer would show that the pasture, if the appellants had any, was somewhere near the pasture in question. The court's ruling was therefore, proper.

The record does not disclose any substantial error, and the judgment should, therefore, be affirmed.

Affirmed.

about the ownership of land, at the time of this transaction, and because the court sustained an objection to a question asked of the appellant Kippie, as to what condition he and the appellant Clark were in, with reference to the pasture, at the time of this transaction. The acts of opinion that the objections to the questions were properly sustained in both instances. Upon their face, the questions asked, would have led to the raising of an immaterial issue in the case; and it there was nothing in the appellant's offer to prove, which indicated that the answer which the witness might have made would be material on the real issue. To have permitted, even as a circumstance, it was at least necessary, that the offer should have indicated, that the answer would show that the pasture, if the appellants had any, was somewhere near the pasture in question. The court's ruling was therefore, proper. The record does not disclose any substantial error, and the judgment should, therefore, be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

5999

617

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

193 I.A. 304

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 5999

Ollie H. Gillette, Appellee

vs

Appeal from Carroll.

The Chicago, Milwaukee & St.

Paul Railway Company. appellant.

Niehaus, J.

This is an action on the case brought by appellee against appellant, in the circuit court of Carroll County. The declaration charges negligence against the appellant, The Chicago Milwaukee & St. Paul Railway Company, in driving a number of wooden piles into the bed of Plum River, for the support of its bridge, at the point where the appellant's right of way intersects the river. And it is alleged, that these piles were driven so close~~ly~~ together, that they formed an obstruction in the stream, to the natural flow of the water at this point; and that they caught the drift matter, which naturally floated in the current of the stream, especially in times of heavy rain, or freshets; and that this caused the waters of the river, in this instance, to back up over appellee's land, and injure his crop of corn.

To the charges of negligence contained in the three counts of the declaration, the appellant filed a plea of not guilty; and upon this plea issue was joined, and a trial by jury had, which resulted in a verdict finding the defendant guilty, and assessing the plaintiff's damages at \$550.00. The appellant made a motion for new trial, and in arrest of judgment; both motions were denied by the court, and judgment was rendered upon the verdict. A reversal of this judgment is sought by the appeal to this court.

One of the grounds urged for reversal, is that the evidence does not sustain the verdict. We think the record

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is sought by the appeal to this court.

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judgment; both motions were denied by the court, and judgment
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and guilty, and assessing the plaintiff's damages at \$500.00
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not guilty; and upon this plea issue was joined, and a trial
counts of the declaration, the appellant filed a plea of

To the charges of negligence contained in the three

and injure his crop of corn.

river, in this instance, to back up over appellee's land,

rain, or freshets; and that this caused the waters of the

in the current of the stream, especially in times of heavy

and that they caught the drift water, which naturally floated

in the stream, to the natural flow of the water at this point;

were driven so closely together, that they formed an obstruction

intersects the river. And it is alleged, that these piles

its bridge, at the point where the appellant's right of way

wooden piles into the bed of Plum River, for the support of

Milwaukee & St. Paul Railway Company, in driving a number of

tion charges negligence against the appellant, The Chicago

appellant, in the circuit court of Carroll County. The declara-

This is an action on the case brought by appellee against

Nichols, J.

Paul Railway Company. appellant.

The Chicago, Milwaukee & St.

vs

Appeal from Carroll.

Ollie H. Gillette, Appellee

Gen. No. 2323

shows that the ~~existence~~ evidentiary facts established by the testimony of the witnesses, fairly justified the inference which the jury must have drawn from them, namely: that the negligence which is the basis of this action, was the proximate cause of the injury to the plaintiff's crop. Where the evidentiary facts fairly justify the inference of the ultimate fact to be proved, their probative force is sufficient to sustain a verdict. (Danlap v Smith, 25 Ill. App. 238.)

Appellant took exception to the admissibility of part of the testimony of the witness David Galloghy. The witness was asked, and answered, about what he observed with reference to the waters of the stream backing up, during the freshet in question. Objection was also made to the admissibility of evidence of Samuel B. Adams, who testified concerning the effect of the overflow waters of Plum River on growing corn. These were all matters of common knowledge, observation and experience; and there was no error in admitting the testimony of these witnesses, on the points in question. And the same may be said of the admissibility of the testimony of the witness James Trafford, who was asked concerning the effect, on the waters of the river, of the lodgment of brush and trees and straw and weeds, between the piling of the bridge.

Appellant urges objections to the first, second and fourth instructions. because the words, "that such extraordinary storms, freshets or rains as could have been reasonably anticipated", were not qualified by adding the words, "by an ordinarily prudent person"; so as to present to the jury, in that part of the instruction, the idea, that such extraordinary storms or rains and freshets are referred to, as could reasonably have been anticipated by an ~~ordinary~~ ~~prudent~~ ordinarily prudent person. The objection, however, loses its force from the fact, that this very qualification, which is insisted

shows that the ~~entire~~ facts established by the testimony of the witnesses, fairly justified the inference which the jury must have drawn from them, namely: that the negligence which is the basis of this action, was the proximate cause of the injury to the plaintiff's crop. Where the facts fairly justify the inference of the negligence, it is not necessary to be proved, that proximate cause is sufficient to sustain a verdict. (Daniel v. Smith, 22 Ill. App. 288.)

Appellant took exception to the admissibility of part of the testimony of the witness David Gallagher. The witness was asked, and answered, about what he observed with reference to the waters of the stream backing up, during the freshet in question. Objection was also made to the admissibility of evidence of Samuel B. Adams, who testified concerning the fact of the overflow waters of Plum River on growing corn. These were all matters of common knowledge, observation and experience; and there was no error in admitting the testimony of these witnesses, on the points in question. And the same may be said of the admissibility of the testimony of the witness James Trafford, who was asked concerning the effect on the waters of the river, of the lodgment of brush and trees and straw and weeds, between the piling of the bridge. Appellant might object to the first, second and fourth instructions. But as the court said, "that such extraordinary storms, freshets or rains as could have been reasonably anticipated," were not defined by either the words, "by an ordinarily prudent person"; so as to present to the jury, in that part of the instruction, the idea, that such extraordinary storms or rains and freshets were required to, as could reasonably have been anticipated by an ordinarily prudent person. The objection, however, loses its force from the fact, that this very qualification, which is insisted

upon by appellant, was strongly presented to the jury in six different instructions, namely: the 8th. 12th. 13th. 15th. 16th. and 20th. which were given for the defendant; and these latter instructions, must be considered in connection with the former. All the instructions must be considered together, and taken as a whole; and when they are thus considered, they present the completed definition pointed out by appellant; and present it with sufficient clearness to have made it apparent to the jury. The law is definitely settled on this point. (City of Chicago v McDonough, 113 Ill. 85; City of Aurora v Seidelman, 34 Ill. App. 385; Slack v Harris 101 Ill. App. 527; Wagner v Myer 95 Ill. App. 68.)

Objection is also made to the 5th. instruction, given for the appellee, because it is claimed that the language does not require the finding by the jury of negligence to be based upon the proof in the case; but that the instruction bases it upon the charge made in the declaration. We do not think this objection is well taken; and do not perceive how the jury could have drawn such an inference from the language of the instruction, taking it altogether; and when the instruction is considered in connection with the other instructions in the case, it is quite evident that they could not have done so.

"One instruction may omit some needed qualification, and even appear to be misleading when considered alone; but may not be misleading, nor improper when considered with other instructions; and it is sufficient if the instructions taken as a whole, present the law to the jury with substantial correctness." (Toluca M. & N. R. Co. v Haws, 194 Ill 92.)

There are no substantial errors apparent in this record; and the judgment should therefore be affirmed.

Affirmed.

upon by appellant, as strongly presented to the jury in its
different instructions, namely: the 8th, 18th, 19th,
15th, 16th, and 20th, which were given for the defendant;
and these latter instructions, must be considered in connection
with the former. All the instructions must be considered
together, and taken as a whole; and when they are thus consid-
ered, they present the completed definition pointed out by
appellant; and present it with sufficient clearness to have
made it apparent to the jury. The law is definitely stated
on this point. (City of Chicago v McDonough, 118 Ill. 82;
City of Aurora v Seibelman, 34 Ill. App. 282; Black v Harris
101 Ill. App. 227; Wigner v Myer 92 Ill. App. 68.)
Objection is also made to the 5th instruction, given
for the appellee, because it is claimed that the language
does not require the finding by the jury of negligence to
be based upon the proof in the case; but that the instruction
passes it upon the charge made in the declaration. We do not
think this objection is well taken; and do not perceive how
the jury could have drawn such an inference from the language
of the instruction, taking it altogether; and when the instruc-
tion is considered in connection with the other instructions
in the case, it is quite evident that they could not have
done so.
"One instruction may omit some needed qualification,
and even appear to be misleading when considered alone;
but may not be misleading, nor improper when considered with
other instructions; and it is sufficient if the instructions
taken as a whole, present the law to the jury with substantial
correctness." (Tolice v. & N. R. Co. v Haws, 194 Ill 92.)
There are no substantial errors apparent in this record;
and the judgment should therefore be affirmed.
Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

618

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

193 I.A. 306

BE IT REMEMBERED, that afterwards, to-wit: on the 9th day
of March, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6044

L. O. Eagleton, Admr. &c.

appellee

vs

Appeal from Peoria.

Prudential Insurance Company

of America. appellant.

Niehhaus, J.

In this suit the appellee L. O. Eagleton, as Administrator of the estate of Rachel Maloff, deceased, claimed a right of recovery on two life insurance policies, dated respectively December 4, 1911 and January 29, 1912; each of said policies having been written on the life of said deceased and issued upon her written application. Each of said policies contained the following provision:

"The Company's liability under this policy shall be limited to a return of the premiums paid hereon, if the insured die before the date hereof, or if on said date the insured be not in sound health."

The case was tried by the circuit court, without a jury, and upon a written stipulation of the facts agreed upon by both parties. From the stipulation it appears, that the deceased died April 24, 1912, in less than six months after the issuance of the first policy, of carcinoma (cancer) of the Uterus; and two or three months after the issuance of the second policy; that at the time of her death, all of the premiums on said policies had been paid; and that the proper proofs of death were furnished after her death. It was further stipulated, that at the time she signed both of the applications in question, and at the time both of said policies were issued, she was suffering of cancer of the womb; that at the time she first made application, she advised the doc-

at the time she first made application, she advised the doctor that she was suffering of cancer of the womb; that applications in question, and at the time both of said policies further stipulated, that at the time she signed both of the proofs of death were furnished after her death. It was premiums on said policies had been paid; and that the proper second policy; that at the time of her death, all of the Uterus; and two or three months after the issuance of the annuity of the first policy, of carcinoma (cancer) of the uterus died April 24, 1918, in less than six months after he died upon a written stipulation of the facts agreed upon by both parties. From the stipulation it appears, that the deceased was not in sound health."

before the date hereof, or if on said date the insured be to a return of the premiums paid hereon, if the insured die "The Company's liability under this policy shall be limited contained the following provision:

and issued upon her written application. Each of said policies said policies having been written on the life of said deceased respectively December 4, 1911 and January 22, 1912; each of right of recovery on two life insurance policies, dated executor of the estate of Rachel Maloff, deceased, claimed a In this suit the appellee L. O. Easton, as Administrator, J.

Prudential Insurance Company
of America.
appellant.
vs
Appeal from Peoria.
appellee
L. O. Easton, Administrator.
Gen. No. 6044

tor examining her on behalf of the company, that she had undergone an operation four months before that time, for fibroid tumor in the uterus, by Dr. Hayes of Peoria, Illinois; said operation consisting of Hysterectomy, or a removal of the womb; that on the 25th. of January 1912, she again made application upon which the second policy was issued; no reference being made in second application to her operation; permission had to be obtained, however, from the company before a second policy could be issued; which permission was granted. Three months later, she died of cancer.

It is further stipulated that if the plaintiff is entitled to recover under the terms of the policies on the ground that the policies were in full force and effect, he would be entitled to recover \$207.40 which would include interest up to the date of judgment; there being a provision on the face of said policies, that if deceased died within six ~~six~~ months after the date thereof, the liability shall be but one half of the face value; and that if, on the contrary, the policies were not in full force and effect as contended by the appellant, because of the deceased not being in sound health at the time of the issuance thereof, then under the terms of said policies, the plaintiff should recover but \$8.90 being the amount of premiums paid by the insured on both policies up to her death.

The circuit court found in favor of the appellee, and rendered a judgment against the appellant, for the sum of \$207.40 and costs of suit; from which judgment an appeal was taken to this court.

The only question involved in the review of this case, is whether or not the limitation of the Company's liability in the policies, based upon the fact that the deceased was not in sound health, at the time the policies were issued, was

the examining her on behalf of the company, that she had undergone an operation for breast cancer at that time, for Illinois tumor in the uterus, by Dr. Peter of Peoria, Illinois; and operation consisting of hysterectomy, at a hospital of the company, on the 25th of January 1913, she again made application upon which the second policy was issued; no reference being made in second application to her operation; permission had to be obtained, however, from the company before a second policy could be issued; which permission was granted. Three months later, she died of cancer.

It is further stipulated that if the plaintiff is entitled to recover under the terms of the policies on the ground that the policies were in full force and effect, she would be entitled to recover \$207.40 which would include interest up to the date of judgment; there being a provision on the face of said policies, that if deceased died within six months after the date thereof, the liability shall be but one half of the face value; and that if, on the contrary, the policies were not in full force and effect as contended by the appellant, because of the deceased not being in sound health at the time of the issuance thereof, then under the terms of said policies, the plaintiff should recover \$128.90 being the amount of premium paid by the insured on both policies up to that date.

The circuit court found in favor of the appellant, and rendered a judgment awarding the appellant, for the sum of \$207.40 and costs of suit; from which judgment an appeal was taken to this court.

The only question involved in the review of this case, is whether or not the limitation of the company's liability in the policies, based upon the fact that the deceased was not in sound health, at the time the policies were issued, was

effective at the time of her death, or had been waived by the appellant.

It is admitted in the record, that the insured did not conceal from the appellant, any facts in regard to her condition of health; but that she gave to appellant all the information and knowledge which she possessed on that subject. And it appears from the evidence, that four months before the time of her application for insurance, she had undergone an operation for the removal of a fibroid tumor in the uterus; and that the operation consisted of Hysterectomy, or the removal of the womb. Sound health, implies a sound condition of the body; and to be healthful, as defined by the authoritative lexicographers of the English Language, means to be in a sound state -- having the parts or organs of the body entire; and their functions in a free, active and undisturbed condition. If the tumor, with which the insured had been afflicted, was of such a grave character, that it was necessary to remove an entire organ from the body of the insured, it can hardly be said, that the appellant, who had knowledge of this, could have reached the conclusion, that she was in sound health; and surely, the appellant had sufficient notice of the defective physical condition of the insured, to be put on inquiry as to the full extent of her physical imperfections.

We are of opinion that having issued the policies in question, and accepted the premiums therefor, with this knowledge of the insured's defective physical condition, the appellant thereby waived its right to enforce the limitation in the policies, by which benefits accruing to the beneficiaries could be forfeited.

If the appellant had notice of the physical unsoundness

effective at the time of her death, or had been advised by the appellant.

It is admitted in the record, that the appellant did not conceal from the appellant, any facts in regard to her condition of health; but that she gave to appellant all the information and knowledge which she possessed on that subject. And it appears from the evidence, that four months before the time of her application for insurance, the appellant was in operation for the removal of a fibroid tumor in the uterus;

and that the operation consisted of hysterectomy, or the removal of the womb. Good health, implies a sound condition of the body; and to be healthy, as defined by the authoritative lexicographers of the English language, means to be in a sound state -- having the parts or organs of the body entire; and their functions in a free, active and undisturbed condition. If the tumor, with which the insured had been afflicted, was of such a grave character, that it was necessary to remove an entire organ from the body of the insured, it can hardly be said, that the appellant, who had knowledge of this, could have reached the conclusion, that she was in sound health; and surely, the appellant had sufficient notice of the defective physical condition of her insured, to be put on inquiry as to the full extent of her physical infirmities.

As a matter of opinion, that having reached the point in question, and accepted the premium tendered, with this knowledge of the insured's defective physical condition, the appellant thereby waived its right to enforce the limitation in the policies, by which benefits according to the policies could be forfeited. If the appellant had notice of the physical infirmities

of the insured, at the time of the issuance of the policies, then the extent of such unsoundness is not material upon the question of its right to enforce the limitation mentioned. In the case of *Deming v Prudential Insurance Co. of America* 169 Ill. App. 102, the court in passing upon an instruction involving this question, says:

"Appellant insists that this instruction was erroneous for the reason that although the agent might have known at the time the ~~policy~~ policies were issued the insured was not in sound health, yet he might not have known that the insured was at that time afflicted with consumption which the evidence shows subsequently caused his death; that in order to constitute a waiver the knowledge on the part of the agent must have been that the insured was afflicted with consumption and the instruction should have so stated . . . The instruction complained of followed the language used in the policy and covered and included in its terms, not only consumption but any other malady or disease which might cause unsound health. If the agent of appellant was notified when he took the application for insurance, that the insured was not in sound health, then it is not entitled to avail itself as a defense of that provision of the policy, which limited its liability if the insured was at such time not in sound health, and it is immaterial what caused such condition of health on the part of the insured. There was therefore no error in the giving of appellees' instruction."

That this kind of limitation of the liability of the insurer in life insurance policies may be waived by the insurer is well settled in this state. (*Hancock Life Ins. Co. v Schlink*, 175 Ill. 284; *Deming v Prudential Ins. Co.* 169 Ill. App. 96; *Harvick v Modern Woodmen of America* 158 Ill. App. 570) The judgment of the Circuit Court of Peoria County should be affirmed.

of the insured, at the time of the issuance of the policies, then the extent of such unreasonableness is not material upon the question of its right to enforce the limitation mentioned. In the case of *Denney v Prudential Insurance Co. of America*, 128 Ill. App. 129, the court in passing upon an instruction involving this question, says:

"Appellant insists that this instruction was erroneous for the reason that although the agent might have known at the time the policy was issued that the insured was not in sound health, yet he might not have known that the insured was at that time afflicted with consumption when the evidence shows subsequently caused his death; that in order to constitute a waiver the knowledge on the part of the agent must have been that the insured was afflicted with consumption and the instruction should have so stated. . . . The instruction complained of followed the language used in the policy and covered and included in its terms, not only consumption but any other malady or disease which might cause unsound health. If the agent of appellant was notified when he took the application for insurance, that the insured was not in sound health, then it is not entitled to avail itself as a defense of that provision of the policy, which limited its liability to the insured was at such time not in sound health, and if the material was correct such condition of health on the part of the insured. There was therefore no error in the giving of appellant's instruction."

That this kind of limitation of the liability of the insurer in life insurance policies may be waived by the insured is well settled in this state. (*Hancock Life Ins. Co. v* *Belink*, 175 Ill. 384; *Denney v Prudential Ins. Co.*, 128 Ill. App. 37; *Hartwick v Modern Woodmen of America*, 128 Ill. App. 370) The judgment of the Circuit Court of Peoria County should be

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ninth day of
March, in the year of our Lord, one thousand nine hundred
and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present -- The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff

193 I.A. 364

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A.D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Pierce Trust & Savings Bank, appellant,

vs.

W. F. Sell, appellee.

Appeal from DeKalb.

DIBBLE, J. On May 27, 1908, the Pierce Trust & Savings Bank, a banking corporation doing business in Sycamore in DeKalb County, entered up judgment by confession on a note for \$1,000, executed by W. F. Sell, of the same city, the judgment, principal, interest and attorney's fees, amounting to \$1,078.25. On July 6, 1908, Sell made a written motion, supported by affidavit, to vacate said judgment and for leave to plead, and an order was entered, vacating the judgment and permitting Sell to plead, but preserving the lien of the judgment on his property. Thereupon Sell filed a plea of the general issue and also seven special pleas, alleging, as reasons why he should not be required to pay said note, want of consideration; insolvency of the Jobbers Manufacturing Company of Illinois, to whom the note was originally given in payment for shares of its capital stock, and knowledge of such insolvency on the part of the Bank and its officers at the time the Bank purchased the note from the Jobbers Company; knowledge by the Bank and its officers of the want of consideration; and a conspiracy between the officers of the Jobbers Company and the officers of the Bank to defraud the defendant. The seventh special plea alleged that, at the time the note here in question was executed, the Jobbers Company entered into a separate written agreement with Sell, by which it was to extend his note for six months after it became due, if he was not ready to pay it when due, and that, at the time judgment was entered, said note was not due by the terms of said agreement. The plaintiff filed replications, denying the charges of conspiracy and claiming that it took the note in the usual course of business for a valuable consideration in good faith before maturity, and that it had no knowledge of the separate written agreement between

and the Jobbers Company. There was a jury trial which resulted in verdict in favor of the defendant. A motion by plaintiff for a new trial was overruled and judgment was entered against plaintiff for costs, from which plaintiff below appeals.

Appellant is organized as a banking corporation under the laws of this State and was engaged in that business in Sycamore in October, 1907, at which time one Townsend was president. About October 19, 1907, J. Crawford, then president of the Jobbers Manufacturing Company of Sycamore, went to appellant and offered to sell it a note executed by appellee on that date, and being for the payment of \$1,000 six months after date to the order of said Jobbers Company, with interest at the rate of seven per cent per annum until paid. The note also contained power of attorney, authorizing any attorney of any court of record to confess judgment on said note at any time after the date thereof, with the customary provisions regarding waiver of process and issue of execution. The appellant bought this note and paid for it by giving the Jobbers Company credit for \$1,000 on a note which appellant held against said Jobbers Company. This transaction was carried on for appellant by the cashier, although he first consulted Townsend, the president of the bank, with regard to the purchase. Appellant held the note until April 18, 1908, when it was due by its terms, and then notified appellee that it held the note and that it was due. Appellee went to the Bank and discussed the matter with the vice president of that institution and with the assistant cashier, at which time appellee stated that he could not pay the note then but would take care of it before the middle of May. He did not take care of the note as he had agreed in his conversation with the vice president of appellant and, on the 27th of May, 1908, appellant caused judgment to be entered upon it in confession. Appellant now asks that the verdict and judgment in the lower court be reversed upon the following grounds: (1) that there

no proof that, when said note was given, said stock was valueless or said corporation was insolvent, or that at the time the note in controversy was purchased by appellant, it or its officers or agents, had any knowledge that appellee had bought stock in the Jobbers Company and had given this note in payment therefor or that the stock was of no value at the time the note was given, or that there was any fraud or conspiracy on the part of appellant or its officers and agents; (2) that the trial court erred in admitting certain evidence offered by appellee; and (3) that the trial court erred in giving certain instructions to the jury, requested by appellee. We will first discuss the second ground, for reversal.

It appears from the testimony that in the summer of 1906, the Jobbers Manufacturing Company of South Dakota, at that time located in Chicago, made an agreement with Townsend, president of appellant, by which Townsend agreed to furnish the company with \$12,500 to be used by it in the purchase of a factory site in the city of Sycamore, the erection of a building thereon and the removal thereto of the machinery, equipment and material of the company; that this agreement was carried out and the company moved to Sycamore and engaged in business there, issuing notes to Townsend for the monies so advanced, which notes were by him assigned to appellant; that then and up to the time the note here in question was given, the company owned considerable equipment and certain patents on hardware specialties and on a gas machine, which it was engaged in manufacturing, and had succeeded in selling stock to a number of residents and business men in Sycamore. During the summer of 1907 it was decided to incorporate under the laws of Illinois and this was done, all the effects, including the good will, of the South Dakota company being transferred to the Illinois company, subject to the debts of the South Dakota Company, which the Illinois company agreed to pay. On the 18th of October, 1907, after the Illinois corporation

and been organized and all the effects of the South Dakota company had been turned over to it, it sold appellee one hundred shares of its preferred stock, of the par value of \$10.00 each, and appellee gave therefor the note here in question. At that time and subsequent hereto the company was operating its plant and manufacturing and selling the articles authorized by its charter. At different times after ~~the purchase of~~ ^{the purchase of} appellee's note, appellant advanced money to the company, ~~once on the note of the company alone and once on the note of the company and its officers.~~ The company continued to carry on its business until about the first of April, 1908, when it ceased to do business. All this evidence as to the transactions and financial condition of the company was offered by appellee and admitted by the court, over the objections of appellant. We have studied this evidence carefully both in the abstract and in the record itself, and we find evidence from which the jury could reasonably conclude that the company was insolvent at the time appellee bought his stock and gave his note therefor or at the time when appellant bought this note from the company. The fact that appellant loaned money to the company, both before and after the date of appellee's note, would tend to show that the bank considered the company to be sound financially. The fact that several of the loans made to the company were evidenced by notes signed not only by the company, but also by the officers of the company in their individual capacity, would not necessarily indicate that the bank considered the company to be insolvent, as such a procedure is often adopted in the ordinary course of banking business. We are of opinion that this evidence as to the financial condition of the company and as to the change in its organization from that of a South Dakota corporation to that of one operating under the laws of this State should not have been admitted and allowed to go to the jury, unless connected with other evidence clearly tending to show that these facts were known to some officer or agent of appellant. Even if there had been such connecting evidence, we fail to find any

of plainly pointing to the insolvency of the company ^{when the note was given.} While appellee alleges in his brief that the stock of the company was not selling all in the summer of 1907, we fail to find any sufficient proof of the fact. There is evidence of the sale of stock to appellee and to one [] and to several other citizens of Sycamore, but there is no evidence of any attempt by the company, or its officers or agents, to sell stock to any person, which failed to result in such sale. Appellee alleges in his brief that the notes of the company were due and unpaid and that it had become necessary to do something to get more money, implying, we presume, that the company was insolvent and hard pressed. The evidence shows that a note of the company for \$2,000 came due in August, 1907, and that the interest had been paid, together with a part of the principal. We find no evidence tending to show that the bank had demanded payment of this note or that the company was pushed for money in the summer or fall of 1907. Appellee contends that the bank knew of the organization of the company under the laws of this State, and evidently claims that this change in organization was a confession of insolvency. Even if the appellant did know of the change in organization on the part of the company, (and the evidence is by no means clear on that point,) still we do not consider that to be any evidence, in itself, of financial embarrassment. Appellee devotes considerable space in his brief to a discussion of the agreement whereby Townsend, the president of appellant, became a trustee of the South Dakota Company for certain purposes, and argues that Townsend's relations with both of these companies were so close that he must have known that the Illinois company was insolvent at the time appellant purchased the note of appellee, but, as we have already stated, we find no satisfactory proof in the record that the Illinois company was in fact insolvent at the time in question. In fact, one Earley, who became president of the company in October, 1907, testified that, from any information he had at that time, the company was solvent. As Earley afterwards assisted the company in securing

credit on two occasions, by signing notes for it, it may be fairly inferred that the president of the company did not consider it insolvent and that it was not, in fact, insolvent in October, 1907. We consider that the evidence introduced in regard to the change in organization and the trust agreement was calculated to mislead the jury, unless followed up by evidence showing the actual insolvency of the company in 1907 and the knowledge of such a condition of affairs by some officer or agent of appellant. Whether or not appellant knew of the change in organization appears to us to be entirely immaterial.

In our opinion, the material question in this case is, whether or not appellant purchased this note in good faith, for a valuable consideration, before maturity. If the evidence shows that appellant, through its officers or agents, at the time it purchased the note of appellee from the company, knew that this note had been given for stock in said company and that said company was insolvent and the stock valueless when it was purchased, then the judgment should stand, as appellant would not be an innocent purchaser, and the note would be without any valuable consideration. If appellant knew none of these things, then the judgment should be reversed and the cause remanded to the lower court for a new trial. Further, even if the evidence shows that appellant, at that time, knew this note had been given for stock in said company, yet if appellant did not know that the company was insolvent and the stock worthless, then the judgment should be reversed and the cause remanded.

We are unable to find any direct evidence in the record to prove that appellant knew the note here in question was given in payment of stock in the Jobbers Company. Appellee testified that he had questioned Townsend, appellant's president, several times with regard to investing some money in the company, but Townsend denies having advised any one to buy the stock, and there is no evidence whatever in the record to show that Townsend knew that appellee had,

in fact, made a purchase of stock. Snow, the cashier of the bank in October, 1907, testified that when he had a talk with Crawford, the president of the company, with regard to the purchase of this note, Crawford did not tell him what the consideration of the note was; that Crawford gave him to understand he was taking this note as a result of some dealings he was having with appellee. We do not consider this as satisfactory proof that the officers of the bank knew that this note was actually given for stock, but even if they did have such knowledge, we are unable to find, after a careful search of the record, any evidence tending to prove that the Jobbere Company was insolvent in October, 1907, or that appellant knew it was insolvent. Had the bank known that the company was insolvent at that time, it would hardly have continued to loan money to the company, even though the notes evidencing such loans were also signed by some of the officers of the company. When the bank called upon appellee to pay this note in the Spring of 1908, six months after its execution and purchase by the bank, it is plain that appellee did not then consider that he had any valid excuse for not paying the note, for he agreed to take care of it about a month later. He did not then accuse the bank of having purchased the note in the face of knowledge on its part that the note had been given by him for worthless stock in an insolvent corporation. In our opinion, appellee has failed to prove three essentials to enable him to avoid payment of this note, namely, that the Company was insolvent and its stock worthless when the note was given, that the bank knew the note was given for stock, and that the bank knew, at that time, that the company was insolvent and its stock worthless. We find no justification in the record for the claim of appellee in his brief that a conspiracy existed whereby appellant was not an innocent owner of said note, or an owner without consideration. The

burden of proof was upon appellee to show that the bank was not an innocent holder and, having failed to do so, the judgment of the court below cannot be sustained.

The first instruction, given for appellee, stated that here a promissory note is given without consideration, the holder of said note cannot collect the same in a suit at law." This is an erroneously statement of the law. The law governing the rights of an assignee of commercial paper has often been discussed by our courts and is sufficiently stated in Comstock v. Hannah, 76 Ill. 530, Murray v. Beckett, 81 Ill. 43, Bradwell v. Pryor, 221 Ill. 602, and Kavanaugh v. Bank of New America, 239 Ill. 404. We are of opinion that the foregoing extract from said instruction is not sufficiently cured by the latter part of the instruction, and that at best it was ~~misleading~~ calculated to mislead the jury upon a very material point in the case. The fourth instruction is so worded as to indicate to the jury that the evidence showed that the facts therein enumerated were known to the bank when it purchased this note, and this was improper. The fifth instruction given for appellee is defective, probably because of the omission of some words intended to be inserted. The other instructions, given for ^{appellee} ~~appellee~~, are involved and contain imperfections. They should be more carefully prepared upon another trial.

The judgment is reversed and the cause remanded.

ms P.J. took no part

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ot-

tawa, this 19th day of July,

in the year of our Lord one thousand nine hundred

and sixty one.

Paul V. Wunder

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present -- The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff

193 I.A. 374

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A.D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Wasson Coal Company, appellee,)

vs.)

American Refractories Company,)

Appellant.)

Appeal from Will.

DIBELL, J. Wasson Coal Company brought this suit against American Refractories Company for coal sold and delivered to the latter upon a contract theretofore existing between the two corporations. The defendant admitted the amount claimed, but filed a plea of set-off, claiming damages in excess of plaintiff's claim for failure on the part of plaintiff to deliver all of the defendant's requirements in the matter of coal, as the contract required. There was a jury trial and a verdict in favor of plaintiff and against defendant's claim of set-off, in the sum of \$1,846.95, which was the full amount claimed by plaintiff. Motions for a new trial and in arrest of judgment were denied, and plaintiff had judgment on the verdict, from which the defendant below appeals.

¶ Appellee's declaration consisted of the common counts. To this, appellant filed the general issue, and also a plea of set-off, which alleged, in brief, that on September 9, 1910, appellant bargained with appellee that appellee sell it appellant's requirements of coal, called Harrisburg three-inch screenings, from September 1, 1910, to March 31, 1912, upon specified terms and conditions; that from September 1, 1910, to December 1, 1911, appellee furnished appellant with its requirements of three-inch screenings; that from December 1, 1911, to March 31, 1912, appellant's requirements of three-inch screenings were 10,499 tons, which amount appellant ordered of appellee; that, during said period, appellee furnished to appellant only 8,691 tons, but would not deliver and refused and neglected to deliver 1,807 tons of said coal, ordered by appellant and required by its plant, by reason whereof

appellant sustained damages in the sum of \$2,027.28. To this plea of set-off, appellee filed a ^{special} replication, averring that the said contract between the parties provided that it was made subject to strikes, accidents, car supply and other causes beyond the control of either party, and that should appellee be unable to fill the specifications of appellant, due to any of those contingencies, appellee should immediately notify appellant of such inability to make full shipments and the reasons therefor; and that, at all times during the life of the contract, when appellee was unable to fill the specifications of appellant, such inability was on account of said contingencies, of which it immediately notified appellant. Appellee also filed a general replication to appellant's plea of set-off and appellant filed a rejoinder ~~thereto~~ *and a replication*.

At the time of the commencement of this suit, appellant was engaged in the manufacture of ~~of~~ silica, magnesite and chrome brick at Rockdale, near Joliet, in Will County. These brick are used in places where resistance to very high temperatures is necessary and are worth from four to twenty-five times as much as common brick. In the process of manufacture these brick are burned in kilns, shaped like bee hives, having eight fire boxes each, placed at equal distances around the base of the kiln. The coal is shoveled into these boxes by hand and, as it is essential that the fire boxes be kept closed, a reasonably fine grade of coal must be used to prevent cold air being sucked in over the top of the fire. These bricks, when hot, are very susceptible to cold air, and, if cooled too rapidly, will check or crack and be worthless. During the last five years prior to the trial appellant had confined itself to the use of three-inch screenings in its kilns and used about 100 tons thereof per day, seven days in the week. On September 9, 1910, appellee and appellant entered into the following contract:

Chicago Sept. 9, 1910.

COAL CONTRACT

WASSON COAL COMPANY OF HARRISBURG, ILL. agrees to sell:

AMERICAN REFRACTORIES COMPANY OF CHICAGO, ILL. agrees to buy:

Quantity:-

Requirements of American Refractories Company's plant at Joliet, Ill. of Harrisburg 3 inch screenings, from September 1st, 1910 to March 31st, 1912.

Price:-

\$1.78 per ton of 2000 pounds, F. O. B. cars Rockdale, Ill. This price is based upon the present freight rate of 98¢ per net ton, and any increase in this rate to be added to the above price and any decrease to be deducted from the above price.

Settlements:-

Weights as ascertained on the scales of the Western Railway Weighing Association at Rockdale, Ill. shall govern settlement, and accounts are due and payable on the 20th of each month for all coal delivered to American Refractories Company during the preceding month.

Shortage in

Shipments 3" screenings: It is agreed that if at any time during the life of this contract the Wasson Coal Co. is unable to supply the entire requirements of the American Refractories Co. of 3 inch screenings, that the Wasson Coal Co. will so advise the American Refractories Co., and the latter shall have the right to specify shipment of Harrisburg Mine Run coal in sufficient quantity to make up the shortage on 3 inch screenings and that the price on such mine run shall be \$1.93 per ton of 2000 pounds, F. O. B. cars Rockdale, Ill.

Strikes, Lockouts,
Accidents & Car
Supply:-

This contract is made, subject to strikes, lockouts, accidents, car supply, and other causes beyond the control of either party hereto, but should the Wasson Coal Company be unable to fill the specifications of the American Refractories Company, due to any of these contingencies, the Coal Company shall immediately notify the Refractories Company of their inability to make full shipments and the reason therefor.

at the time this contract was executed, it was understood ^{and stated in writing} between the parties that the requirements of appellant would be about 100 tons per day, for seven days in the week, but it was customary for the operating head of appellant to notify appellee from time to time of the amount of coal required. Appellee furnished appellant with its entire requirements of coal from the date of the contract, September 1, 1910, up to December 1, 1911. From December 1, 1911, to and including March 31, 1912, the date of expiration of the contract, appellant ordered 10,499 tons of appellee, about 1,600 tons less than its ordinary requirements of 100 tons per day. Appellee did not furnish appellant with the amount ^{between} ~~ordered during~~ the dates specified, but only sent it 8,691 tons, and the difference between the amount ordered by appellant and the amount received by it from appellee was 1,807 tons. Appellant contends that, in order to make up this deficiency and to keep its kilns going, it was obliged to go out into the open market and purchase such coal as it could get, at a much higher price than it would have had to pay appellee under the contract; that it expended \$2,027.28 in ^{excess of the contract price in} purchasing such coal, or \$180.83 more than it ~~then~~ owed appellee for the coal it did furnish to appellant; and that appellee was producing coal in sufficient quantities to have ^{applied} ~~supplied~~ appellant with its requirements and should be held liable for the amount appellant was obliged to expend outside of said contract. Appellee contends that its production of the kind of coal required by appellant was materially reduced by causes expressly mentioned by the contract as excusing it from liability; that appellant was increasing its orders considerably over and above what it actually required to run its kilns and was storing coal in anticipation of a possible strike on or about April 1, 1912; that appellant was only entitled to order from appellee so much coal as it actually needed to run its kilns up to the expiration of the contract, but not for purposes of storage, to be used at some indefinite date after the contract had expired; and that app-

ellant, in purchasing outside coal, did not do so to the best advantage, but purchased coal of a higher grade and at a higher price, than was necessary; and that, by reason of all the conditions, appellee is relieved from all liability for failure to fill the orders of appellant.

During the last four months of the life of this contract, from December 1, 1911, to March 31, 1912, the total production of appellee's mine amounted to 122,330 tons of coal. This is called mine run coal, that, is, all the coal that comes from the mine. The kind of coal specified in the contract as "three inch screenings" meant all coal that could pass ~~through~~ through screens having ^{openings} holes three inches in ~~diam~~ ^{wid} diameter. There ~~was~~ is between 55% and 60% of three inch screenings in the mine run coal, and whether three inch screenings are produced or not simply depends upon whether or not the coal is run over a three inch screen. Three inch screenings may be further separated or divided into coal called "No. 1 nut," "No. 2 Nut," "No. 3 Nut," and "inch and a quarter screenings," but these four sizes, when put together, or before being separated, are three inch screenings. Appellant contends that, in determining the amount of three inch screenings appellee produced ~~was~~ for each of the last four months of the contract, there should be taken into consideration, not only the amount listed as three inch screenings, but also the amounts produced in the shape of No. 1 nut, No. 2 Nut, No. 3 Nut and inch and a quarter screenings, as these latter, before being separated, amount to three inch screenings. If this computation of appellant is accepted, appellee produced, during those four months, nearly 9,000 tons of three inch screenings. On the other hand, if we confine the computation strictly to the ~~actual~~ amount of three inch screenings produced as such, as testified ~~to~~ by a representative of appellee, we find from the record that appellee produced 23,337 tons of three inch screenings during those four months. During the same time appellant's orders were for 10,499 tons of three inch screenings, and it was only furnished with 8,691 tons. In appellee's brief it claims that the evi-

dence that appellee produced 20,740 tons of three inch screenings during the month of March, 1912, is an error, but we are unable to see the force of its reasoning and we are obliged to take the figures as they appear in the record. In either event, appellee is shown to have been able to produce an amount of three inch screenings, by combining its production of No. 1 Nut, No. 2 Nut, No. 3 Nut and inch and a quarter screenings during these four months, or by not separating the three inch screenings into those different classes, much more than sufficient to have supplied the requirements of appellant. There is no evidence in the record, so far as we can ascertain, to show that appellee was under obligations to furnish its coal, of whatever size, to other customers, more binding than its obligation to furnish appellant with its orders of three inch screenings. Much stress is laid by appellee upon the evidence by the manager of appellee as to the curtailment of its production during the months mentioned, by reason of accidents, cold weather, lack of men, etc. Without discussing these matters in detail, we doubt very much whether they constitute sufficient excuse for appellee's failure to fulfill its contract. The evidence clearly shows that, in spite of all these hindrances, appellee was able to produce 122,330 tons of coal during this period and, in our opinion, it has shown no valid reason why it could not have produced and delivered to appellant 10,499 tons of three inch screenings. It did furnish appellant 8,691 tons and apparently should have had no difficulty in furnishing 1,807 tons more. This shortage of 1,807 tons amounted to about 45 cars of coal and in regard to that shortage appellee's manager testified: "I did not make up the shortage of 45 cars claimed by the defendant. I did not intend to make it up and I did not make it up." There is no claim in this testimony that appellee could not have made up this shortage; simply, that it did not intend to do so.

Appellee contends that appellant did not need all the coal it was ordering for the purpose of running its kilns up to the 31st day

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of March, 1912, the date of the termination of the contract, but that it was using, or trying to use, its contract with appellee to secure coal to be stored and used by it after April first, should there be a strike among the coal miners; that it had no right to coal from appellee for storage purposes; and it is at least implied that this was one of the reasons for the failure of appellee to fulfill its contract. When appellee entered into this contract, it expected to be called upon to furnish appellant with about 100 tons of coal per day, for seven days in the week; in other words, that it would be called upon to furnish appellant with 12,100 tons of coal during the last four months of the contract. Instead of ordering that amount during that period, appellant only ordered 10,499 tons and the evidence shows that it actually consumed in its kiln during that same period 10,285 tons. It is therefore shown that, in four months, appellant only ordered 214 tons more than it actually required for its kiln, or about two days supply, and that its orders were actually 1,600 tons less than appellee had expected to be called upon to furnish when it entered into this contract. We fail to find any evidence tending to show that appellant was engaged in obtaining from appellee under this contract, storing a large quantity of coal, for use after March 31st and we do not deem it necessary to discuss the question whether or not appellant would have been entitled to use its contract for such a purpose.

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The proof shows that appellant feared there would be a strike in the coal mines in April, 1912, and that it would be unable to procure coal for the operation of its business for some time. Before December, 1911, appellant began buying coal and storing it for use during said expected strike, and before the end of this contract appellant had bought and stored enough coal to enable it to operate its business for a month or six weeks after April 1, 1912. Appellee sought to have appellant buy said storage coal from it, but appellant refused to do so, because appellee was already so much in arrears under this contract. Appellant bought said storage coal elsewhere and did not obtain any of it from appellee. When appellee failed to supply the amount of coal required by the contract during December, January, February and March, and appellant needed coal for its daily use and found it difficult to buy the required coal on the market, it took some coal for immediate needs from the other coal in storage. Appellant had a right to return that amount of coal to the storage pile from coal supplied by appellee under this contract, without subjecting itself to the claim that it was using this Contract to store up coal for use after April 1, 1912. We are of opinion that appellant's orders, during these four months, were no more than were required for its actual operations and that, during the same period, appellee produced enough coal to have enabled it to ~~have~~ filled those orders.

The evidence of appellant is undisputed that the total shortage in appellee's shipments was 1,807 tons and that this shortage existed at or shortly prior to March 9, 1912. On that date appellant wrote appellee as follows:

" x x x In checking up your shipments against our specifications, we find that you are today short 45 cars, and as your shortage in shipments is necessitating our using for current needs other coal that we have purchased for use after the first of April, we shall expect you to make up the shortage above stated, and as there is very little time left in which to make purchases for shipment this month, we request that you advise us so that we will have your reply by the 12th inst. as to whether you will make up this shortage before March 20th, as, if you do not, we shall be obliged to buy it elsewhere at market prices for your account. For your information and that you will know positively that we have not been specifying shipments in excess of what we are consuming, we wish to inform you that during the month of February we burned about 2,900 tons of coal at our kilns."

On March 12th appellee wrote appellant as follows:

" x x x our inability is such, and has been such the last few days that we are not going to be in a position to fill all of your requirements, and we would kindly ask that you make arrangements to take care of your interests elsewhere; however, as soon as we can get started we will do the best we can. We will notify you from time to time how our prospects are."

On receipt of this letter appellant made inquiries of all the coal operators in the district regarding the securing of a supply of coal of suitable quality sufficient to make up the deficiency, and, on March 13th and 14th, purchased about ⁴⁴⁰ ~~250~~ tons. On March 19th appellee wrote that it would be almost impossible for it to furnish appellant the entire requirements of what its contract called for, and thereafter appellant made other purchases. We are satisfied, from the evidence, that appellant used ~~the utmost~~ diligence in making these purchases, to secure the required quality of coal as cheaply as possible, and was unable to secure the kind of coal it required, save at a considerable advance above the price at which appellee contracted to furnish it. As, in the view we take of this case, it must be remanded for another trial, we deem it unnecessary to discuss the question in detail.

There does not seem to be any evidence upon which to base the 9th and 10th instructions, given at the request of appellee. A given instruction for appellee and the modification of an instruction requested by appellant seem to make the measure of damages as to coal taken from its storage to supply appellee's failure to meet appellant's requirements to be the difference between the contract price and the fair cash market value of the storage coal "at the time it was used." If this instruction had said "at the time that it was taken from the storage," we think it would be correct, but there was no proof to the precise day when coal, taken from the storage, was put into appellant's furnace, and manifestly it is not likely that that could be shown, and if this instruction meant to have the measure of damages based as to such coal at the precise date when it was actually put into the furnace, we think it was incorrect. As to at least one instruction given at appellee's request and one instruction requested by appellant and refused, there was evidence tending to obviate the case stated in

the instruction, and it was not proper to give such instruction without a reference to the proof introduced by the other side. Complaint is made of the refusal of an instruction, requested by appellant, to disregard evidence that it offered to compromise its damages with appellee for a less sum than it now claims under its plea of set off. The instruction was based upon a correct legal principle, but we fail to find any evidence upon which to base it. Appellant made a written statement to appellee of its damages by reason of appellee's failure to perform its contract, and placed them at much less than it now claims, but we find no proof that it did this by way of compromise. It was asserting what it then conceived to be its legal rights, and the fact that it then claimed less than now was a proper matter to be considered by the jury. That instruction was therefore properly refused. There are other instructions which are open to criticism, but their discussion by counsel will doubtless prevent their recurrence upon another trial.

of their defects
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 The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

I, PAUL V. WUNDER, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 19th day of July, in the year of our Lord one thousand nine hundred

and sixty-one
Paul V. Wunder
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

193 I.A. 376

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6005.

Roscoe Durflinger, appellee.

vs

Appeal from Co. Ct. Kankakee.

J. K. Fisher, appellant.

Niehaus, J.

This action was originally brought by Roscoe Durflinger appellee before a justice of the peace, for forcible detainer, to recover possession of farm lands, from J. K. Fisher, appellant. The case was tried on appeal, in the county court of Kankakee County. There was a jury trial, and at the close of all the evidence, on motion of appellee, the court instructed the jury to find ~~for~~ the issues for the appellee; and the jury returned a verdict in accordance with the instruction. The appellant made a motion for a new trial, which was denied; and the court thereupon rendered a judgment against the appellant, on the verdict; from which judgment an appeal was taken to this court. The question to be determined, is whether the county court was in error in directing a verdict for the appellee and entering judgment thereon.

It appears from the evidence, that the appellant, had a written lease of the lands in question, from the owners, Absalom Harrison and Myron Harrison; the term in the lease being from March 1, 1912, to March 1, 1913. This term was extended to March 1, 1914 by written endorsement on the back of the lease, which was signed by all the parties. The appellant claims, that in the latter part of September, or in December, 1913, a verbal agreement was made by the parties to the lease, to again extend the term of the tenancy for another year; which extension of the lease, was from March 1, 1914 to March 1, 1915.

It further appears from the evidence, that before the expiration of appellant's term under the written lease, the

expiration of appellant's term under the written lease, the
It further appears from the evidence, that before the
1, 1915.

which extension of the lease, was from March 1, 1914 to March
again extend the term of the tenancy for another year;

a verbal agreement was made by the parties to the lease, to

that in the latter part of September, or in December, 1913,

which was signed by all the parties. The appellant claims,

to March 1, 1914 by written endorsement on the back of the lease,

from March 1, 1912, to March 1, 1913. This term was extended

Salom Harrison and Byron Harrison; the term in the lease being

a written lease of the lands in question, from the owners, Ap-

It appears from the evidence, that the appellant, had

and entering judgment thereon.

court was in error in directing a verdict for the appellee

court. The question to be determined, is whether the county

the verdict; from which judgment an appeal was taken to this

court thereupon rendered a judgment against the appellant, on

made a motion for a new trial, which was denied, and the

a verdict in accordance with the instruction. The appellant

to find for the issues for the appellee; and the jury returned

evidence, on motion of appellee, the court instructed the jury

County. There was a jury trial, and at the close of all the

The case was tried on appeal, in the county court of Kansas

to recover possession of farm lands, from J. K. Fisher, appellant.

appellee before a justice of the peace, for forcible detainer,

This action was originally brought by Roscoe Durlinger

Nichols, J.

J. K. Fisher, appellant.

vs

Appeal from Co. Ct. Kansas.

Roscoe Durlinger, appellee.

Gen. No. 8005.

ownership of the premises in question was transferred, by Absalom Harrison and Myron Harrison, to George Dainty and Edward Pearson. On February 24, 1914, a written lease was made by the new owners, as parties of the first part, and appellee, as party of the second part, leasing the premises in question to appellee, from the date of this lease to March 1, 1915. Appellee made a demand on appellant, after the expiration of a wellant's term under the written extension of the lease, for possession; and possession being refused, he commenced this suit.

Appellant made objection to the introduction of appellee's lease, because it was executed in person only by George Dainty, who, assuming to act for Ed. Pearson, had signed Pearson's name to the same; and appellant insists, that Dainty's authority to execute the lease for Pearson, should have been shown, before the lease became competent evidence. This preliminary proof, insisted upon by appellant, was not necessary, inasmuch as the law presumes, in this case, in the absence of evidence to the contrary, that the lease in question was made with the knowledge and consent of Pearson. (Schwartz v McQuaid 214 Ill. 357. Moreover a lease signed by one of two tenants in common would entitle the lessee to possession of the premises involved.

Appellant also insists that no sufficient foundation was laid for the introduction of the record of the deed of Myron Harrison and wife to George Dainty and Edward Pearson conveying part of the premises in controversy. The preliminary proof made for the introduction of the record of the deed was sufficient, under Section 35 of Chapter 30 of the Conveyance Act, in the revised statutes. The introduction of this deed in evidence, however was apparently unnecessary, as it had already been proven by oral testimony, which was introduced

ownership of the premises in question was transferred, by Absalom Harrison and Myron Harrison, to George Dinty and Edward Pearson. On February 24, 1914, a written lease was made by the new owners, as parties of the first part, and appellee, as party of the second part, leasing the premises in question to appellee, from the date of this lease to March 1, 1915. Appellee made a demand on appellant, after the expiration of appellee's term under the written extension of the lease, for possession; and possession being refused, he commenced this suit.

Appellant made objection to the introduction of appellee's lease, because it was executed in person only by George Dinty, who, according to set for Ed. Pearson, had signed Pearson's name to the same; and appellant insists, that Dinty's authority to execute the lease for Pearson, should have been shown, before the lease became competent evidence. This preliminary proof, insisted upon by appellant, was not necessary, inasmuch as the law presumes, in this case, in the absence of evidence to the contrary, that the lease in question was made with the knowledge and consent of Pearson. (Wheeler v. Wheeler, 214 Ill. 357. Moreover a lease signed by one of two tenants in common could entitle the leasee to possession of the premises involved.

Appellant also insists that no sufficient foundation was laid for the introduction of the record of the deed by Myron Harrison and wife to George Dinty and Edward Pearson conveying part of the premises in controversy. The preliminary proof made for the introduction of the record of the deed was sufficient, under Section 32 of Chapter 30 of the Conveyance Act, in the revised statutes. The introduction of this deed in evidence, however, was apparently unnecessary, as it had already been proven by oral testimony, which was introduced

without objection, that George Dainty and Edward Pearson had purchased and become the owners of the premises in question, before the expiration of appellant's tenancy under his written lease. The verbal agreement to extend appellant's term to March 1, 1915, was clearly within the statute of Frauds. Rader v Hoffman, 125 Ill. App. 454. Appellee had a right to question the legality of the verbal agreement to extend appellant's tenancy. Folrath v Hutchin 125 Ill. App. 434. The evidence shows no legal right in appellant, to the possession of the premises, and appellant claimed none, except the right based on the verbal agreement. The Court therefore, properly instructed the jury, to find the issues for appellee.

The judgment of the county court should be affirmed.

Affirmed.

without objection, that the Daily and Evening News had
 purchased and become the owner of the premises in question,
 before the expiration of appellant's term of office as
 trustee. The verbal agreement to extend appellant's term as
 trustee, March 1, 1915, was clearly within the statute of Florida, Chapter
 v Hoffman, 185 Ill. App. 434. Appellee had a right to question
 the legality of the verbal agreement to extend appellant's
 term. *Folsom v Hutchins* 125 Ill. App. 434. The evidence
 shows no legal right in appellant, to the possession of the
 premises, and appellant claimed none, except the right based
 on the verbal agreement. The Court therefore, properly in-
 structed the jury, to find the issue for appellee.
 The judgment of the county court should be affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

630

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice. 193 I.A. 378

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Denied June 11/15

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6011.

The Ravinia Co. appellee

vs

Appeal from Co. Ct. Lake.

Jean M. Strobel, appellant.

Niehaus, J.

This was an action of forcible detainer, brought by appellee, The Ravinia Company, against appellant, Jean M. Strobel, for the possession of a part of Ravinia Park property, described in the amended complaint filed by appellee. There was a jury trial in the County Court of Lake County, and at the close of all the evidence, the Court, on motion of appellee, instructed the jury to find the appellant guilty in manner and form as alleged in the complaint, of unlawfully withholding from appellee, the possession of the premises in question; and to find, that the right to the possession of said premises, was in the appellee. The jury returned a verdict as directed; and the appellant thereupon made a motion for a new trial which was denied. The court rendered judgment on the verdict and the cause is brought to this court on appeal.

There are various errors assigned, but the controlling question involved is, whether or not the Court was justified in directing the jury to find a verdict against the appellant. The proof shows that the appellant went into possession of the premises in question, under a written lease from George M. Seward, Receiver for A. C. Frost, dated December 16, 1908; the term of her tenancy under the lease, was for one year, ending December 15, 1909; and the appellant had an option, under the lease, to hold for two years longer; provided the Receiver was in possession, and had authority to lease, at the expiration of the year. The option provided for, was taken by appellant; and, her term thereby extended to terminate

taken by appellant; and, her term thereby extended to terminate the expiration of the year. The option provided for, was under the lease, to hold for two years longer; provided the term of her tenancy under the lease, was for one year, ending December 15, 1908; and the appellant had an option, Reward, Receiver for A. C. Frost, dated December 15, 1908; premises in question, under a written lease from George W. The proof shows that the appellant went into possession of the in directing the jury to find a verdict against the appellant. question involved is, whether or not the Court was justified There are various errors assigned, but the controlling and the cause is brought to this court on appeal.

which was denied. The court rendered judgment on the verdict and the appellant thereupon made a motion for a new trial was in the appellate. The jury returned a verdict as directed; to find, that the right to the possession of said premises, from appellee, the possession of the premises in question; and term as alleged in the complaint, of unlawfully withholding instructed the jury to find the appellant guilty in manner and the close of all the evidence, the Court, on motion of appellee, was a jury trial in the County Court of Lake County, and at described in the amended complaint filed by appellee. There Strobel, for the possession of a part of Ravinia Park property, appellee, The Ravinia Company, against appellant, Jean M.

This was an action of forcible detainer, brought by

Michael, J.

Jean M. Strobel, appellant.

vs

Appellant from Co. Ct. Lake.

The Ravinia Co., appellee

Can. No. 6011.

December 15, 1911; and, after that date, she became a tenant of appellee from year to year. The lease was assigned to appellee on July 27, 1911; and on September 20, 1913, appellee gave appellant a written notice to terminate her tenancy on December 15, 1913; and demanded, that she surrender possession of the premises on that day.

It is claimed by appellant, that the notice should have terminated the tenancy on December 16th. the anniversary date of the commencement of the term, instead of December 15th. the anniversary date of the end of the term. The general rule of law, concerning notices of this character, was stated in the case of Prickett v Ritter, 16 Ill. 97, and the court says, in passing on the point in question; "The authorities all seem to agree, that where notice is required it must be given a due length of time before, and terminate with a regular period in the tenancy; that is at the end of a year, half year, quarter, month or week, according to the party's right to terminate it by the notice."

But the matter is fixed definitely by the statute concerning land-lord and tenant; and section 5 of chapter 80 of the act, requires, that "in all cases of tenancy from year to year, 60 days' notice in writing shall be sufficient to terminate the tenancy at the end of the year." The notice therefore, properly terminated the tenancy, at the end of the year; and no further demand for possession was necessary, before bringing suit. (Section 7, Chapter 80, Hurd's Revised Statutes; Stillman v Palis, 134 Ill. 532.)

It is insisted that the description of the premises in the lease is indefinite and uncertain. The description of the premises in this case meets the legal requirement. It is sufficiently definite and certain, if the premises can be readily identified and located. (C. & St. L. R. R. Co. v

December 15, 1911; and, after that date, she became a tenant of the premises from year to year. The lease was assigned to appellee on July 27, 1911; and on September 30, 1913, appellee gave appellant a written notice to terminate her tenancy on December 15, 1913; and demanded, that she surrender possession of the premises on that day.

It is claimed by appellant, that the notice should have terminated the tenancy on December 15th. The anniversary date of the commencement of the term, instead of December 15th. the anniversary date of the end of the term. The general rule of law, concerning notices of this character, was stated in the case of *Prickett v Ritter*, 18 Ill. 87, and the court says, in passing on the point in question: "The authorities all seem to agree, that where notice is required it must be given a due length of time before, and terminate with a regular period in the tenancy; that is at the end of a year, half year, quarter, month or week, according to the party's right to terminate it by the notice."

But the matter is fixed definitely by the statute concerning land-lord and tenant; and section 2 of chapter 80 of the act, requires, that "in all cases of tenancy from year to year, 60 days' notice in writing shall be sufficient to terminate the tenancy at the end of the year." The notice therefore, properly terminated the tenancy, at the end of the year; and no further demand for possession was necessary, before writing said. (Section 7, Chapter 80, Hurd's Revised Statutes; *Stillman v Paine*, 134 Ill. 532.)

It is insisted that the description of the premises in the lease is indefinite and uncertain. The description of the premises in this case meets the legal requirement. It is sufficiently definite and certain, if the premises can be readily identified and located. (*O. & St. L. R. Co. v*

Wiggins Ferry Co. 82 Ill. 230; Stillman v Palis, 134 Ill. 533.)

Appellant also urges an objection to the sufficiency of the preliminary proof, for introducing the lease, and the assignment of the lease in evidence. We think the lease and assignment were properly admitted in evidence, under the proofs made; and that it appeared with sufficient clearness, that the assignment offered in evidence was the assignment of the lease in question.

Appellant contends, that because no preliminary proof was offered to show that the president of the Ravinia Company signed the name of the company to the notice, to terminate appellant's tenancy, no proper foundation was laid, for the introduction of the notice in evidence. It is sufficient to say, concerning this contention, that no objection was made on the trial, to the introduction of the notice, on that ground. The general objection which was made, does not cover the lack of proof on this point. (Buckley v Robertson, 186 Ill. App. 605.) However, under the pleadings in the case, the notice was admissible without preliminary proof of its execution. (Section 52, Chapter 110, Hurd's Revised Statutes.)

There was no evidence tending to show, that appellant had a legal right to the possession of the premises in question, as against appellee. The peremptory instruction, therefore was proper; and the court did not err in directing a verdict. The record does not show any substantial error, and the judgment should, therefore, be affirmed.

Affirmed.

Albino Ferry Co., 85 Ill. 230; *Albino v. Wells*, 122 Ill. 531.)
 A party who offers in objection to the admissibility of the
 preliminary proof, for introducing the lease, and the assignment
 of the lease in evidence, is taking the lease and assignment
 were properly admitted in evidence, under the proviso made; and
 that it appeared with sufficient clearness, that the assignment
 offered in evidence was the assignment of the lease in
 question.

Appellant contends, that because no preliminary proof
 was offered to show that the president of the Albino Company
 signed the name of the company to the notice, to terminate
 appellant's tenancy, no proper foundation was laid, for the
 introduction of the notice in evidence. It is sufficient to
 say, concerning this contention, that no objection was made
 on the trial, to the introduction of the notice, or that
 ground. The general objection which was made, does not cover
 the lack of proof on this point. (*Brooklyn v. Robertson*, 118
 Ill. App. 808.) However, under the pleadings in the case, the
 notice was admissible without preliminary proof of its execu-
 tion. (Section 25, Chapter 110, *Hurd's Revised Statutes*.)
 There was no evidence tending to show, that appellant had
 a legal right to the possession of the premises in question,
 as against appellee. The preliminary instruction, therefore
 was proper; and the court was not in error in admitting it. The
 record does not show any substantial error, and the judg-
 ment should, therefore, be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT.
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

193 I.A. 379

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6 019.

The Palmer National Bank, appellant.

vs

Appeal from Kankakee.

U. V. Lewis, appellee

Niehaus, J.

This is a suit in assumpsit, commenced by appellant The Palmer National Bank, in the circuit court of Kankakee County against appellee, J. V. Lewis, to recover as legal holder, on a promissory note made by appellee, for the sum of \$400.00 bearing date March 3, 1910, and payable to the order of the Wendle Remedy Company, nine months after date, with interest at the rate of six per cent per annum.

It is claimed by appellant, that the payee assigned and delivered the note in question to it, before maturity, as collateral security for an indebtedness of the payee. The appellee pleaded, in ~~xxxx~~ defense of appellants claim, the general issue, and filed a verified plea denying the assignment and delivery of the note before maturity; and also filed a plea, averring a want of consideration, and a failure of consideration.

There was a trial by jury, which resulted first, in a disagreement of the jury; and then, on a second trial, a verdict was returned by the jury, finding the issues for the defendant. Appellant made a motion for a new trial; but the abstract does not show, whether or not this motion was passed on by the court. The court rendered judgment on the verdict; and an appeal was then prayed and allowed. The record is brought to this court to review matters of alleged error, committed on the trial of the case.

The record, however, does not contain any assignment of errors, as required by Rule 12. This of itself, is fatal to the appeal. But passing nevertheless, to a consideration

to the appeal. But passing nevertheless, to a consideration of errors, as required by Rule 18. This of itself, is fatal to the record, however, does not contain any assignment

committed on the trial of the case.

brought to this court to review matters of alleged error, and an appeal was then prayed and allowed. The record in

on by the court. The court rendered judgment on the verdict; exact does not show, whether or not this motion was passed

ndant. Appellant made a motion for a new trial; but the ap- pect was returned by the jury, finding the issues for the de-

lasreement of the jury; and then, on a second trial, a ver- There was a trial by jury, which resulted first, in a

overing a want of consideration, and a failure of consideration. delivery of the note before maturity; and also falsification, and filed a verified plea denying the assignment and

pledged, in which defense of appellant claim, the general liability security for an indebtedness of the payee. The appellee

livered the note in question to it, before maturity, as col- It is claimed by appellant, that the payee assigned and de-

six per cent per annum.

Company, nine months after date, with interest at the rate of date March 3, 1910, and payable to the order of the Wendle

promissory note made by appellee, for the sum of \$400.00 bearing against appellee, J. V. Lewis, to recover as legal holder, on a

The Palmer National Bank, in the circuit court of Kanawha County This is a suit in assumpsit, commenced by appellant

Nichols, J.

J. V. Lewis, appellee

vs

Assault from Kanawha.

The Palmer National Bank, appellant.

Can. No. 5 019.

of some of the errors which have been assigned in the abstract, and referred to in appellants brief, we find that appellant makes the claim, that the verdict is against the weight of evidence. This is a question that can be raised here, only, if the point was made on a motion for a new trial, and then overruled by the court. The abstract, which we must assume contains a correct statement of the record in that regard, shows no ruling made by the court, on the motion for a new trial; and, if no ruling was made by the court, then appellant is not in position to raise the question suggested. But, on examination of the evidence, there does not appear to be any proper basis for appellant's claim.

The appellant ~~xx~~ also claims, that the court erred in refusing to admit certain evidence, which was offered by appellant on the trial. Several witnesses for the appellee testified, on the trial, that after the maturity of the note in question, it was in the hands of the Bank of Momence, for collection; and that they saw it there; and that at the time they saw it, no endorsement was upon the back of the note. In rebuttal, appellant offered evidence to show, that the note was endorsed when it was delivered to appellant, some time before its maturity. The appellant then called J. E. Walker a bank examiner, as a witness; and offered to prove, "that the examiner, examined the books and notes of the Palmer National Bank, on two occasions, between March 5, 1910 and December 2, 1910 while 'Plaintiff's Exhibit 1' (the note) was in the files of the Palmer National Bank;" which proof the court, on appellee's objection, refused to admit. It is evident that appellant did not offer to prove, that the two occasions were the same time when the appellee and his witnesses, claimed they saw the note in the possession of the Bank of Momence. As this was the only material bearing the evidence offered,

of some of the errors which have been pointed out in the abstract, and referred to in appellant's brief. We find that appellant makes the claim, that the verdict is against the weight of evidence. This is a question that cannot be raised here, only, if the point was made on a motion for a new trial, and even if overruled by the court. The abstract, which we must assume contains a correct statement of the record in that regard, shows no ruling made by the court, on the motion for a new trial; and, if no ruling was made by the court, then appellant is not in position to raise the question suggested. But, on examination of the evidence, there does not appear to be any proper basis for appellant's claim.

The appellant also claims, that the court erred in refusing to admit certain evidence, which was offered by appellant on the trial. Several witnesses on the appellee testified, on the trial, that after the maturity of the note in question, it was in the hands of the Bank of Commerce, for collection; and that they saw it there; and that at the time they saw it, no endorsement was upon the back of the note. In rebuttal, appellant offered evidence to show, that the note was endorsed when it was delivered to appellant, more than before its maturity. The appellant then called J. E. Walker, a bank examiner, as a witness; and offered to prove, that the examiner, examined the books and notes of the First National Bank, on two occasions, between March 5, 1910 and December 5, 1910 while 'Plaintiff's Exhibit 1' (the note) was in the files of the First National Bank; and to prove the court, on appellee's objection, refused to admit. It is evident that appellant did not offer to prove, that the two occasions were the same time when the appellee and his witnesses, obtained the note in the possession of the Bank of Commerce. As this was the only material bearing the evidence offered,

could have had in the case, the objection was properly sustained.

Viewing the case, however, upon its merits, there was, apparently, sufficient proof of a failure of consideration for the note in question, to justify the finding of the jury. The note was obtained from the appellee, by the Wendle Remedy Company, the payee, as a consideration for the transfer to appellee, of the sole right to use a certain remedy in Kankakee for hemorrhoids; and for fifty shares of stock in the Wendle Remedy Company, which were to be issued to appellee. It was agreed between the parties, as appears from the receipt given appellant for the note in controversy, that in case the stock was not issued to appellee, the consideration of the note would be refunded. The stock was never issued to appellee, although he made a demand for it. After this, the ~~Kankakee Company~~ Wendle Remedy Company allowed its incorporation to lapse, and legally went out of existence.

If the appellant did not become the legal holder of the note in question before maturity, then the failure and refusal to issue to appellee the fifty shares of the stock, was a legal defense, on the question of failure of the consideration of the note. And we are of opinion, that a preponderance of the evidence shows that the note in question, was not endorsed over to appellant, until after maturity. "A promissory note cannot be assigned ~~xxx~~ under our statute so as to vest the legal title in the assignee, except by endorsement of the note itself." Packer & Roberts 140 Ill. 671.

The verdict of the jury was, apparently, in accordance with the weight of the evidence, on the vital issue in the case, and the court did not err in rendering judgment on the verdict for the defendant. The judgment should be affirmed.

Affirmed.

ould have had in the case, the objection was properly sustained.

Viewing the case, however, upon its merits, there was, apparently, sufficient proof of a failure of consideration for the note in question, to justify the finding of the jury.

The note was obtained from the appellee, by the Wandle remedy company, as a consideration for the transfer to the appellee, of the sole right to use a certain remedy in Kanakae remedy company, and for fifty shares of stock in the Wandle remedy company, which were to be issued to appellee. It was agreed between the parties, as appears from the receipt given to the appellee for the note in controversy, that in case the stock was not issued to appellee, the consideration of the note would be refunded. The stock was never issued to appellee, although the appellee made a demand for it. After this, the Kanakae Remedy Company allowed its incorporation to lapse, and legally went out of existence.

If the appellant did not become the legal holder of the note in question before maturity, then the failure and refusal to issue to appellee the fifty shares of the stock, was a legal defense, on the question of failure of the consideration of the note. And we are of opinion, that a preponderance of the evidence shows that the note in question, was not endorsed over to the appellant, until after maturity. "A promissory note cannot be assigned under our statute so as to vest the legal title in the assignee, except by endorsement of the note itself."

Exr. v Roberts 140 Ill. 671.

The verdict of the jury was, apparently, in accordance with the weight of the evidence, on the vital issue in the case, and the court did not err in rendering judgment on the verdict as defendant. The judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6036

634

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

193 I.A. 387

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6036

Wilfred A. Johnson, appellee

vs

Appeal from City Court Kewanee.

Galesburg & Kewanee Electric

Railway Company, appellant.

Niehaus, J.

This is an action on the case for damages, brought in the city court of Kewanee, by Wilfred A. Johnson, the appellee, against the appellant, Galesburg and Kewanee Electric Railway Company. The declaration alleges that the appellee was riding along Rose Street, in the city of Kewanee, in a carriage drawn by a horse, driven by one Clarence Cantwell; and that at the intersection of Rose and Boss streets, one of the electric cars of the appellant ran into, and struck the carriage that appellee was riding in, with great force and violence; and thereby threw appellee out of the carriage, and upon the ground; causing the injury to his person, for which he claims damages.

The appellee bases his right to recover, on the alleged negligence of appellant's servants in driving the electric car in question at a high rate of speed; and because the car did not have a sufficient head-light; and because no bell was rung or gong sounded; nor any other alarm given, of the approach of the car.

The evidence in the case showed, that the appellee and another man, by the name of Clarence Cantwell, came to Kewanee together, in a covered buggy, drawn by a horse; and that Cantwell was doing the driving. During the afternoon and evening of the day in question, after transacting a little business, and visiting a number of saloons, where they drank beer, and bought a bottle of whiskey, they started for home; using the same horse and buggy for that purpose. It was about half past ten

Wilfred A. Johnson, appellee

Appeal from City Court Kansas.

vs

Gallesburg & Kawane Electric

Railway Company, appellant.

Wichita, Kan., 1.

This is an action on the case for damages, brought in the city court of Kansas, by Wilfred A. Johnson, the appellee, against the appellant, Gallesburg and Kawane Electric Railway Company. The declaration alleges that the appellee was riding along Rose Street, in the city of Kansas, in a carriage drawn by a horse, driven by one Clarence Gantwell; and that at the intersection of Rose and Rose streets, one of the electric cars of the appellant ran into, and struck the carriage that appellee was riding in, with great force and violence; and thereby threw appellee out of the carriage, and upon the ground; causing the injury to his person, for which he claims damages. The appellee bases his right to recover, on the alleged negligence of appellant's servants in driving the electric car in question at a high rate of speed; and because the car did not have a sufficient head-light; and because no bell was rung or long sounded; nor another alarm given, of the approach of the car. The evidence in the case shows, that the appellee and another man, by the name of Clarence Gantwell, came to Kansas together, in a covered buggy, drawn by a horse; and that Gantwell was doing the driving. During the afternoon and evening of the day in question, after transacting a little business, and visiting a number of saloons, where they drank beer, and bought a bottle of whiskey, they started for home; using the same horse and buggy for that purpose. It was about half past ten

in the evening; and Cantwell was again doing the driving. He drove the horse along Boss street into Rose Street, where appellant was operating an Interurban car line; and as they were about to cross the track of this Interurban line, going south, appellant's car came along from the east, and collided with the rear end of the buggy, in which appellee and Cantwell were riding; causing the horse to run away, and run the buggy into a telegraph pole situated about nineteen or twenty feet from the point of the collision with the car; and ther by precipitating the appellee to the sidewalk, near the pole, and injuring him.

There was considerable conflict in the evidence, concerning the rate of speed at which the interurban car was running, at the time of the collision; also upon the question of, whether or not, a gong was sounded, or warning given of the approach of the car.

These were questions of fact, which were properly left for determination of the jury. The evidence clearly establishes the fact, however, that the appellee was not injured by force of the collision with the interurban car; nor thrown upon the ground, from the force of such collision; but that the effect of the collision, was to cause the horse to run away with the buggy; which resulted in another collision, namely, of the buggy with a telegraph pole, near by the scene of the first collision; and that the appellee was thrown upon the ground, and injured, in consequence of the force of the latter collision. A variance, therefore, clearly existed between the allegations in the declaration, and the proof, as to the manner in which the appellee was injured; and such a variance is fatal to a recovery under the averments of the declaration. *Wabash Ry. Co. v Freedman*, 146 Ill. 583. *Joris v Illinois Steel Co.* 101 Ill. App. 416; *Wabash Railroad Co. v Billings*, 212 Ill. 37; *Chicago Union Traction Co. v Hampe*, 228 Ill. 347.

in the evening; and Gantwell was again doing his duty. He drove the horse along Ross street into Ross street, where the defendant was operating an Interurban car line; and he was about to cross the track of this Interurban line, going south, when the defendant's car came along from the east, and collided with the rear end of the buggy, in which Applebee and Gantwell were riding; causing the horse to run away, and run the buggy into a telegraph pole situated about nineteen or twenty feet from the point of the collision with the car; and thereby precipitating the Applebee to the sidewalk, near the pole, and injuring him. There was considerable conflict in the evidence, concerning the rate of speed at which the Interurban car was running at the time of the collision; also upon the question of, whether or not, a horse was rounded, or running given of the approach of the car. These were questions of fact, which were properly left for determination of the jury. The evidence clearly establishes the fact, however, that the Applebee was not injured by force of the collision with the Interurban car; nor thrown upon the ground, from the force of such collision; but that the effect of the collision, was to cause the horse to run away with the buggy; which resulted in another collision, namely, of the buggy with a telegraph pole, near by the scene of the first collision; and that the Applebee was thrown upon the ground, and injured, in consequence of the force of the latter collision. A variance, therefore, clearly existed between the allegations in the declaration, and the proof, as to the manner in which the Applebee was injured; and such a variance is fatal to a recovery under the averments of the declaration. *Amesbury v. Q. v. Freedman, 146 Ill. 513. 101 v. Illinois Steel Co. 101 Ill. 416; Chicago Railroad Co. v. Williams, 218 Ill. 37; Chicago & North Western Co. v. Hanson, 218 Ill. 37.*

The appellant pointed out the variance between the averments of the declaration, and the proof, on the motion to strike out the evidence; which motion was made at the conclusion of plaintiff's case. The question of variance was again raised, on the motion for a new trial; though not specifically pointed out on that motion; but, inasmuch as the variance still existed, and had really become more apparent at the close of appellant's evidence in defense, and the close of appellee's evidence in rebuttal, we are of opinion, that it was not necessary, to again point out the ~~xxxxxx~~ ~~specifically~~ variance specifically, on the motion for a new trial, in order to have the question passed upon by ~~the court~~. this court.

The record of the evidence shows, that the court ruled out the inquiry, about what the witness, Hepner, had answered to attorney Demerath, at a certain time and place, concerning alleged statements made to the witness by the appellee, with reference to the merits of his case. This inquiry, we think was competent; at least, for the purpose of laying a foundation for impeachment of the credibility of the witness; and the fact, that the matters about which it was claimed the witness had answered, were read to him from a paper, did not impair its competency for the purpose indicated. We think that the court erred in ruling out this inquiry.

Objection is made to the fifth instruction given for appellee which embodies the idea, that if the jury found, that the appellee himself was in the exercise of ordinary care; and that he was in the buggy as the invited guest of the driver of the horse, and that the driver had the sole control and management of the horse and buggy; then even though the driver, was guilty of a want of ordinary care, and thereby ~~xxxxxx~~ contributed to the happening of the accident in question, that such want of care on the part of the driver, should not be imputable to the ap-

The appellant pointed out the variance between the statement of the appellant, and the proof, on the motion to strike out the evidence; which motion was made at the conclusion of plaintiff's case. The question of variance was again raised, on the motion for a new trial; though not specifically pointed out on that motion; but, inasmuch as the variance still existed, and had really become more apparent at the close of appellant's evidence in defense, and the close of appellee's evidence in rebuttal, we are of opinion, that it was not necessary, to again point out the ~~xxxxxxxxxxxxxxxxxxxx~~ variance specifically, on the motion for a new trial, in order to have the question passed upon by ~~the court~~. this court.

The record of the evidence shows, that the court tried out the inquiry, about what the witness, Hepler, had answered to Attorney Damerath, at a certain time and place, concerning all the statements made to the witness by the appellee, with reference to the merits of his case. This inquiry, we think was competent; at least, for the purpose of laying a foundation for impeachment of the credibility of the witness; and the fact, that the matters about which it was claimed the witness had answered, were read to him from a paper, did not impair its competency for the purpose indicated. We think that the court erred in ruling out this inquiry.

Objection is made to the fifth instruction given for appellee which embodies the idea, that if the jury found, that the appellee himself was in the exercise of ordinary care; and that he was in the buggy as the invited guest of the driver of the horse, and that the driver had the sole control and management of the horse and buggy; then even though the driver, was guilty of want of ordinary care, and thereby ~~xxxxxxxxxxxxxxxx~~ contributed to the happening of the accident in question, that such want of care on the part of the driver, should not be imputable to the ap-

appellee; and that the appellee was, nevertheless, entitled to recover. If as a matter of fact, the driver was intoxicated; and appellee placed himself in the driver's care, knowing of such intoxication; and that because of the driver's intoxication, he failed to exercise ordinary care, in the management of the horse and vehicle in question, it cannot be said, as a matter of legal responsibility, that appellee would not be, under these circumstances, chargeable with such lack of ordinary care, on the part of the driver; yet the jury could very well infer, from the language of the instruction in question, that the appellee would not, under these circumstances be chargeable with such lack of ordinary care on the part of the driver. The instruction was, therefore, misleading, in view of the fact, that it was a controverted question in the case, based upon the evidence, whether or not the driver was intoxicated; and whether or not, on that account, he did or did not exercise ordinary care, in the management of the horse and vehicle. The same error, here pointed out, also appears in the seventh instruction, given for appellee. Both instructions, for the reasons stated, had a tendency to mislead the jury in the determination of questions of fact in dispute, which were material, and affected the right to a recovery in the case.

The other objections made to the instructions under consideration, namely, that the instructions limited the matter of the care exercised by the appellee, for his own safety, to "the time of the injury complained of", we do not regard as well taken, under the facts and circumstances presented by the evidence. In this case, as in the case of *L. S. & M. S. Ry. Co. v Ouska*, Admx. 151 Ill. 236, the phrase, "at the time of the injury complained of", covered the whole of the transaction which was involved in the determination of the question

to believe; and that the appellee was, nevertheless, entitled to recover. It is a matter of fact, however, that the driver was intoxicated; and appellee placed himself in the driver's path; such intoxication; and that because of the driver's intoxication, he failed to exercise ordinary care, in the management of the horse and vehicle in question, it cannot be said, as a matter of legal responsibility, that appellee would not be, under these circumstances, chargeable with such lack of ordinary care, on the part of the driver; yet the jury could very well infer, from the language of the instruction in question, that the appellee would not, under these circumstances, be chargeable with such lack of ordinary care on the part of the driver. The instruction was, therefore, misleading, in view of the fact, that it was a controverted question in the case, based upon the evidence, whether or not the driver was intoxicated; and whether or not, on such account, he did or did not exercise ordinary care, in the management of the horse and vehicle. The same error, here pointed out, also appears in the seventh instruction, given for appellee. Both instructions, for the reasons stated, had a tendency to mislead the jury in the determination of questions of fact in dispute, which were material, and allocated the right to a recovery in the case.

The other objections made to the instructions under consideration, namely, that the instructions limited the matter of the care exercised by the appellee, for his own safety, to "the time of the injury complained of," do not amount to well taken, under the facts and circumstances presented by the evidence. In this case, as in the case of *U. S. Ry. Co. v. Owen*, 151 Ill. 336, the phrase, "at the time of the injury complained of," covered the whole of the transaction which was involved in the determination of the question

of the exercise of care by appellee, and the instruction was therefore not misleading in this particular.

But for the errors indicated, the judgment of the court below should be reversed, and the cause remanded for another trial.

Reversed and remanded.

of the exercise of care by appellee, and the instruction was therefore not misleading in this particular. But for the errors indicated, the judgment of the court below should be reversed, and the cause remanded for another trial. Reversed and remanded.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

✓ Hon. JOHN M. NIEHAUS, Justice. 193 I.A. 390

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day
of April, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6047

Utica Hydraulic Cement Co.

appellee

vs

Appeal from LaSalle.

The C. R. I. & P. Ry. Co.

appellant.

Niehaus, J.

This is an action on the case, commenced by the Utica Hydraulic Cement Company, appellee, in the circuit court of LaSalle County against the appellant, the Chicago Rock Island and Pacific Railway Company. The appellant was charged in the declaration, with negligence in failing to provide its locomotive engines with appliances to prevent the escape of fire, and keep them in repair, and use them in such a manner, that fire would not escape; and that in consequence of such alleged negligence, sparks and brands of fire escaped from a locomotive of the appellant, and set fire to appellee's barn, which was situated about 150 feet north of appellant's railroad tracks.

The case was tried by a jury; and at the close of the evidence for appellee, both sides, respectively, rested their case. The court thereupon instructed the jury, as to the legal questions involved; and the jury returned a verdict finding the appellant guilty and assessing the appellee's damages at \$1250. The appellant made a motion for a new trial, and also, in arrest of judgment. Both motions were denied by the court and a judgment was rendered upon the verdict, from which judgment an appeal was taken to this court.

The principal errors insisted upon, by appellant, are: First, that the trial court erred in not granting appellant's motion, to exclude the evidence offered by appellee, from the consideration of the jury; and in not directing a verdict for the defendant; secondly, that the court erred in giving to the

Utica Hydraulic Cement Co.

appellee

Appellant

vs

The C. R. I. & P. Ry. Co.

Appellant

Chicago, Ill.

This is an action on the case, commenced by the Utica Hydraulic Cement Company, appellee, in the circuit court of Cass County against the appellant, the Chicago Rock Island and Pacific Railway Company. The appellant was charged in the declaration, with negligence in failing to provide its locomotive engines with appliances to prevent the escape of fire, and keep them in repair, and use them in such a manner, that fire would not escape; and that in consequence of such alleged negligence, sparks and brands of fire escaped from a locomotive of the appellant, and set fire to appellee's barn, which was situated about 150 feet north of appellant's railroad tracks. The case was tried by a jury; and at the close of the evidence for appellee, both sides, respectively, rested their case. The court thereupon instructed the jury, as to the legal questions involved; and the jury returned a verdict finding the appellant guilty and assessing the appellee's damages at \$1350. The appellant made a motion for a new trial, and also, in arrest of judgment. Both motions were denied by the court, and a judgment was rendered upon the verdict from which judgment appeal was taken to this court.

The principal errors insisted upon, by appellant, are, first, that the trial court erred in not granting appellee's motion, to exclude the evidence offered by appellee, from the consideration of the jury; and in not directing a verdict for the appellant; secondly, that the court erred in giving to the

jury appellee's third instruction; and thirdly, it is urged, that the court should have given to the jury the ninth instruction offered by appellant; and that it erred, in refusing to give it.

In reference to the first error assigned by appellant, it may be said, that there was evidence to show, that just previous to the fire, a locomotive belonging to appellant, was passing along appellant's track, near the barn in question; which locomotive, in its operation, threw out large quantities of cinders; that a breeze was blowing; and that from certain points along the track, where this locomotive was passing, this breeze was blowing in the direction of the east end of appellee's barn; and that a fire was noticed in the hay loft near the opening in the east end of this barn, very closely following the passing of the locomotive. From these circumstances, together with others proven, the jury could very well have drawn the inference, that the fire originated from a cinder, which, while still burning, was thrown out of appellants engine, and carried by the breeze through the east opening of appellee's barn, and set fire to the hay therein.

The evidence, in cases of this kind, is nearly always circumstantial; and whether the fire was caused in the manner alleged, is usually a matter of inference from the circumstances proven. And the law is, that where evidentiary facts fairly justify the inference of the ultimate fact to be proven, their probative force is sufficient to sustain a verdict. *Dunlap v Smith* 25 Ill. App. 288. We are of opinion therefore, that the court did not err in refusing to strike out the evidence, and direct a verdict for appellant.

Objection is made to the third instruction given for appellee which is as follows:

"The court instructs the jury that proof of the destruction of property by fire escaping from a locomotive raises a prima facie

jury appellee's third instruction; and finally, it is urged, that the court should have given to the jury the ninth instruction offered by appellant; and that it erred, in refusing to give it. In reference to the first error assigned by appellant, it may

be said, that there was evidence to show, that just previous to the fire, a locomotive belonging to appellant, was passing along appellant's track, near the barn in question; which locomotive, in its operation, threw out large quantities of cinders; that a breeze was blowing; and that from certain points along the track, where this locomotive was passing, this breeze was blowing in the direction of the east end of appellee's barn; and that a fire was noticed in the hay loft near the opening in the east end of this barn, very closely following the passing of the locomotive. From these circumstances, together with others proven, the jury could very well have drawn the inference, that the fire originated from a cinder, which, while still burning, was thrown out of appellee's engine, and carried by the breeze through the east corner of appellee's barn, and set fire to the hay therein.

The evidence, in cases of this kind, is nearly always circumstantial; and whether the fire was caused in the manner alleged, is usually a matter of inference from the circumstances proven. And the law is, that where evidence is so proven, fairly justify the inference of the facts to be proven, their probative force is sufficient to sustain a verdict.

Lynch v Smith 25 Ill. App. 2d 323. It is a common mistake, that the court did not set in reference to similar cases and evidence, and direct a verdict for appellant.

Objection is made to the third instruction given to

appellee which is as follows:

"The court instructs the jury that proof of the destruction of property by fire escaping from a locomotive raises a prima facie

case of negligence, which the defendant must rebut by showing the absence of negligence by a preponderance of the evidence or that plaintiff's own fault or negligence contributed to the injury."

This instruction, which contains an abstract proposition of law, is, perhaps technically inaccurate. It may properly be questioned, as an abstract proposition of law, that the defendant in a case, must rebut the proof of negligence which makes a prima facie case for plaintiff, by showing the absence of such negligence, by a preponderance of the evidence. But, while this definition may not be strictly accurate, in the abstract, still, inasmuch as it had reference merely to the amount of evidence which it was declared was incumbent on appellant to offer in defense, and as appellant did not offer any evidence, the instruction could not have had any material effect; and could not very well have been taken into consideration by the jury, in weighing the probative force of the only evidence which was offered; namely, the evidence adduced by appellee.

It may also be emphasized here, that the statement in the instruction with reference to the preponderance of the evidence, under discussion, must be considered in connection with the statements in regard to the same matter, in the other instructions, which were given for appellant; and when so considered, it is clear, that the jury could not have been misled about the law, on the real question involved; or the feature of the rule regarding the preponderance of the evidence, which was applicable to the case. If the evidence of the circumstances warranted the jury in drawing the inference, that the fire which consumed appellee's barn, was caused by a burning cinder or spark emanating from appellant's locomotive, a prima facie case was made out under the Statute; and the burden was then

case of negligence, which the defendant must rebut by showing the absence of negligence by a preponderance of the evidence or that plaintiff's own fault or negligence contributed to the injury."

This instruction, which contains a n abstract proposition of law, is, perhaps technically inaccurate. It may properly be questioned, as an abstract proposition of law, that the defendant in a case, must rebut the proof of negligence which makes a prima facie case for plaintiff, by showing the absence of such negligence, by a preponderance of the evidence. But, while this definition may not be strictly accurate, in the abstract, still, inasmuch as it had reference merely to the amount of evidence which it was declared was incumbent on respondent to offer in defense, and as appellant did not offer any evidence, the instruction could not have had any material effect; and could not vary well have been taken into consideration by the jury, in ascertaining the probative force of the only evidence which was offered; namely, the evidence adduced by appellee.

It may also be emphasized here, that the statement in the instruction with reference to the preponderance of the evidence, under discussion, must be considered in connection with the statements in regard to the same matter, in the other instructions, which were given for appellant; and when so considered, it is clear, that the jury could not have been misled about the law, on the real question involved; or the features of the rule regarding the preponderance of the evidence, which was applicable to the case. If the evidence of the circumstances warranted the jury in drawing the inference, that the fire which consumed appellee's barn, was caused by a burning candle or spark emanating from appellant's locomotive, a prima facie case was made out under the Statute; and the burden was then

uponx appellant, to prove such facts as would excuse it. C. C. C. & St. L. Ry. Co. v Stevens, 74 Ill. App. 586.

As was said in the case of T. St. L. & W. R. R. Co. v Needham 105 Ill. App. 25, "To overcome appellee's prima facie case the burden was upon the appellant to show that appliances for arresting the sparks, on each of the three engines in question, were of the most approved kind, and were in good repair, and each engine was carefully and skillfully handled by a competent engineer."

There was no error in refusing the ninth instruction asked by the appellant, inasmuch as the propositions of law presented therein, were already set out in the seventh and eighth instructions, which were given to the jury, at the request of appellant.

The record in this case does not show any reversible error; and the judgment should, therefore, be affirmed.

Judgment affirmed.

upon appellant, to prove each fact as stated above it. C. C.

C. & St. L. Ry. Co. v. Evans, 74 Ill. App. 333.

As was said in the case of T. St. L. & W. R. R. Co. v. Needham

102 Ill. App. 32, "To overcome appellee's prima facie case

the burden was upon the appellant to show that appliances for

arresting the wheels, on each of the three engines in ques-

tion, were of the best approved kind, and were in good repair,

and each engine was carefully and skillfully handled by a com-

petent engineer."

There was no error in refusing the ninth instruction

asked by the appellant, inasmuch as the propositions of law

present therein, were already set out in the seventh and

eighth instructions, which were given to the jury, at the

request of appellant.

The record in this case does not show any reversible

error; and the judgment should, therefore, be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. } Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6013

636

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

193 I.A. 392

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the ¹¹~~16~~th day
of ~~April~~^{June}, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

1908, A. 1001

Gen. No. 6013.

Edwards & Bradford Lumber Co .

a corporation. appellant.

vs

Appeal from Co. Ct. Peoria.

G. Bontjes et al. appellees.

Carnes, P. J.

This is a suit in assumpsit prosecuted by Edwards & Bradford Lumber Co. a corporation, the appellant, against the appellees G. Bontjes and J. H. Bontjes, a partnership, to recover \$248.33 the purchase price of eight carloads of coal sold and delivered to appellees in February 1913. Appellees claim that they purchased the coal of one McCullough and not of appellant, and that there is no contractual relation between them and appellant, and no indebtedness that can be recovered in this suit brought in the name of appellant. A jury trial resulted in a verdict and judgment for the defendants and the plaintiff appeals. G. Bontjes is dead and the case proceeds against J. H. Bontjes, the surviving partner.

It appears from the evidence that prior to July 1, 1912 McCullough was the lessee and operator of a coal mine at Spaulding Illinois, and was in financial trouble. On that date he entered into a written contract with appellant in relation to the coal business there conducted. The document is not in evidence, a copy was offered by appellant and excluded by the court, apparently on the ground that there was no foundation laid for the introduction of secondary evidence. The copy so offered is not shown in the record. Oral evidence as to the substance of the contract was offered by appellant and heard without objection, and there is other oral evidence from agents of appellant as to the relation existing, presumably because of the contract, between appellant and McCullough. From some of this evidence

Gen. No. 6013.
 Edwards & Bradford Lumber Co.
 appellant.
 A party from Co. Ct. Peoria.
 vs
 G. Bontjes et al. appellees.
 Carney, P. J.

This is a suit in assumpsit prosecuted by Edwards & Bradford Lumber Co. a corporation, the appellant, against the appellees G. Bontjes and J. H. Bontjes, a partnership, to recover \$248.33 the purchase price of eight carloads of coal sold and delivered to appellees in February 1913. Appellees claim that they purchased the coal of one McCullough and not of appellant, and that there is no contractual relation between them and appellant, and no indebtedness that can be recovered in this suit brought in the name of appellant. A jury trial resulted in a verdict and judgment for the defendant and the plaintiff appeals. G. Bontjes is dead and the case proceeds against J. H. Bontjes, the surviving partner. It appears from the evidence that prior to July 1, 1913 McCullough was the lessee and operator of a coal mine at Blandville, Illinois, and was in financial trouble. On that date he entered into a written contract with appellant in relation to the coal business there conducted. The document is not in evidence, a copy was offered by appellant and excluded by the court, apparently on the ground that there was no foundation laid for the introduction of secondary evidence. The copy so offered is not shown in the record. Oral evidence as to the substance of the contract was offered by appellant and excluded without objection, and there is other oral evidence from agents of appellant as to the relation existing, presumably because of the contract, between appellant and McCullough. From some of this evidence

it may be inferred that at the time of the sale of the coal in question appellant was the owner of the entire output of the mine and had an arrangement with McCullough ^{that} ~~and~~ all coal should be shipped in the name of appellant, and all invoices prepared in the office of appellant and by it sent to the purchasers ; and all moneys due for coal should be collected by appellant; that McCullough's relation to the mine was strictly that of operator and he had no connection with the purchasers of coal, except in the capacity of salesman for appellant, and except that he was permitted to sell to retail customers taking coal from the mine in wagons on his own account; and from some of the evidence it may be inferred that appellant was handling the output of the mine as sales agent for McCullough. It seems that McCullough was operating the mine at his own expense and appellant was furnishing him money to carry on the business under the provisions of this contract, among which was one that appellant was to have eight per cent and McCullough ninety two per cent of the amount received for car load shipments from the mines, and was to advance McCullough on notice of such shipment ninety two per cent of the selling price and collect the whole amount from the purchaser. It is likely that the relation between appellant and McCullough created by this contract could easily be determined from a knowledge of its exact terms, but the case was tried without getting that information into the record and leaving a disputed question of fact in relation thereto.

While McCullough was acting under this contract appellees were operating a coal mine nearby, and there is evidence that it was customary for McCullough and appellees' agent there to borrow powder of each other to be repaid in kind or in some other way. And it appears that about the time the eight car loads of coal in question were shipped to appel-

it may be inferred that at the time of the sale of the coal in question appellant was the owner of the entire output of the mine and had an arrangement with McCullough that all coal should be shipped in the name of appellant, and all invoices prepared in the office of appellant and by it sent to the purchasers; and all moneys due for coal should be collected by appellant; that McCullough's relation to the mine was strictly that of operator and he had no connection with the purchasers of coal, except in the capacity of salesman for appellant, and except that he was permitted to sell to retail customers taking coal from the mine in wagons on his own account; and from some of the evidence it may be inferred that appellant was handling the output of the mine as sales agent for McCullough. It appears that McCullough was operating the mine at his own expense and appellant was furnishing him money to carry on the business under the provisions of this contract, among which was one that appellant was to have eight per cent and McCullough ninety two per cent of the amount received for car load shipments from the mines, and was to advance McCullough on notice of such shipment ninety two per cent of the selling price and collect the whole amount from the purchaser. It is likely that the relation between appellant and McCullough created by this contract could easily be determined from a knowledge of its exact terms, but the case was tried without getting that information into the record and leaving a disputed question of fact in relation thereto.

While McCullough was acting under this contract appellees were operating a coal mine nearby, and there is evidence that it was customary for McCullough and appellees' agent there to borrow powder of each other to be repaid in kind or in some other way. And it appears that about the time the eight car loads of coal in question were shipped to appellant

lees, McCullough procured of appellees through their agent at their mine, 100 kegs of powder of the value of \$115.00. Appellees claim that the powder was obtained by McCullough with the express agreement that they would pay for it with coal, and that the eight car loads of coal in question were shipped to appellees pursuant to that agreement and as a part of the same transaction. Appellant claims that the purchase of the powder was the individual affair of McCullough with which it had no connection and that appellees had notice of the fact that it owned the coal at and before the time of the sale; and there is evidence tending to support each claim. There was some negotiation between appellant and appellees in relation to the matter after the delivery of the coal, and appellees offered to pay appellant the difference between the price of the coal and the price of the powder, which offer was refused. There were other occurrences after the delivery of the coal tending to show a recognition by appellees of appellant as their creditor in the matter, and there is conflict in the evidence as to some of these matters.

Aside from the question of the contents and meaning of the written contract between appellant and McCullough, which should have been determined by the introduction of the contract in evidence or by proof of loss and introduction of the copy in evidence leaving the Court to instruct the jury, if necessary, as to its construction, the important controversy was whether the coal was sold and delivered to appellees by McCullough as a part of the transaction in which he obtained the powder from them, and whether appellees knew of appellant's connection with the business, and whether there was any obligation incurred to pay appellant for the coal by transactions subsequent to the sale and delivery.

At the close of the evidence the court refused the

less, McGillich purchased of appellees through their agent at their mine, 100 bags of powder of the value of \$15.00. Appellees claim that the powder was obtained by McGillich with the express agreement that they would pay for it with coal, and that the eight car loads of coal in question were shipped to appellees pursuant to that agreement and as a part of the same transaction. Appellant claims that the purchase of the powder was the individual affair of McGillich, with which it had no connection and that appellees had notice of the fact that it owned the coal at and before the time of the sale; and there is evidence tending to support each claim. There was some negotiation between appellant and appellees in relation to the matter after the delivery of the coal, and appellees offered to pay appellant the difference between the price of the coal and the price of the powder, which offer was refused. There were other occurrences after the delivery of the coal tending to show a recognition by appellees of appellant as their creditor in the matter, and there is conflict in the evidence as to some of these matters.

Aside from the question of the contents and meaning of the written contract between appellant and McGillich, which should have been determined by the introduction of the contract in evidence or by proof of loss and introduction of the copy in evidence leaving the Court to instruct the jury, it necessarily, as to its construction, the important controversy was whether the coal was sold and delivered to appellees by McGillich as a part of the transaction in which he obtained the powder from them, and whether appellees knew of appellant's connection with the business, and whether there was any obligation incurred to pay appellant for the coal by transactions subsequent to the sale and delivery.

At the close of the evidence the court refused the

request of each party for a peremptory instruction directing a verdict and at the request of the defendants gave the jury among others, three instructions as follows:

3. "The court instructs the jury that if you believe from the evidence that the coal in question, at the time it was purchased by the defendant, through their agent, P. J. Matheny if you believe from the evidence that the defendant did so purchase it, was the property of E. W. McCullough and not the property of the plaintiff, then the plaintiff cannot recover in this case, and you should find the issues joined for the defendant, unless you further believe from the evidence that the defendant knew or had reason to believe that the plaintiff had the exclusive control of the putput of the mine operated by said McCullough."

4. "The court instructs the jury that if you believe from the evidence that the contract for the purchase of the coal in question was entered into between E. W. McCullough under the name of the Spaulding Coal Company, and the defendant, through their agent, P. J. Matheny, then the plaintiff cannot recover in this case and you should find the issues joined for the defendants."

5. "The court instructs the jury that before the plaintiff can recover in this case that it must prove, by the greater weight of evidence that the defendant purchased the coal in question from it, the plaintiff, and that they have not paid for the same. If the plaintiff fails to make this proof, you should find for the defendant."

In short: If McCullough owned the coal, and appellant did not have the exclusive control of the putput of the mine (and there was no claim or evidence that it did ~~not~~ have such control); or if the coal was sold under the name of the Spaulding Coal Company (and there was evidence tending to show it was);

request of each party for a preliminary instruction directing a verdict and at the request of the defendants the jury among others, three instructions as follows:

3. "The court instructs the jury that if you believe from the evidence that the coal in question, at the time it was purchased by the defendant, through their agent, P. J. Mahoney, if you believe from the evidence that the defendant did so purchase it, was the property of E. W. McCullough and not the property of the plaintiff, then the plaintiff cannot recover in this case, and you should find the issues joined for the defendant, unless you further believe from the evidence that the defendant knew or had reason to believe that the plaintiff had the exclusive control of the output of the mine operated by said McCullough."

4. "The court instructs the jury that if you believe from the evidence that the contract for the purchase of the coal in question was entered into between E. W. McCullough and the name of the Souding Coal Company, and the defendant, through their agent, P. J. Mahoney, then the plaintiff cannot recover in this case and you should find the issues joined for the defendant."

5. "The court instructs the jury that before the plaintiff can recover in this case that it must prove, by the greater weight of evidence that the defendant purchased the coal in question from it, the plaintiff, and that they have not paid for the same. If the plaintiff fails to make this proof, you should find for the defendant."

In short: If McCullough owned the coal, and defendant did not have the exclusive control of the output of the mine (and there was no claim or evidence that it did not have such control); or if the coal was sold under the name of the Souding Coal Company (and there was evidence tending to show it was);

or if the coal was not purchased from appellant (and the jury would likely understand purchased direct from it,) and there was not affirmative proof that it had been paid for; then and in either of those conditions, regardless of all other considerations, a verdict for the defendant was directed. These instructions were clearly wrong and were in direct conflict with instructions given for the plaintiff as modified by the court in which the jury were told "if the defendants, by their actions after the purchase by the defendants treated the plaintiff as their creditor and the seller and owner of the said screenings" or "knew or had notice that the plaintiff had the exclusive control of and right to sell the entire output of the mine" or if the defendants "by their actions after the purchase treated the plaintiff as the defendants' creditor and as the seller of the whole amount of the screenings" then and in either of those conditions the verdict must be for the plaintiff for the full amount of its claim.

It is familiar law that a series of instructions are to be read as a whole, and a bad instruction may sometimes be explained and cured by others of the series if a verdict is not directed in the bad instruction, but if it is, that the error can not be cured by other contradictory instructions. We are of the opinion that because of these erroneous instructions the judgment should be reversed and the cause remanded for another trial, notwithstanding the fact that appellant is responsible for a part of the errors it here complains of.

Appellant argues that it was at least an undisclosed principal in the transaction and as such entitled to recover in this suit, and appellees say if appellant is an undisclosed principal it must accept the trade of its agent as it finds it and if McCullough as the agent of an undisclosed principal paid for powder for his own use with coal belonging to appellant

or if he coal was not purchased from appellant (and the jury would likely understand purchased direct from it), and there was not affirmative proof that it had been paid for; then and in either of those conditions, regardless of all other consid-

erations, a verdict for the defendant was directed. These instructions were clearly wrong and were in direct conflict with instructions given for the plaintiff as modified by the court in which the jury were told "if the defendants, by their ac-tions after the purchase by the defendants . . . treated

the plaintiff as their creditor and the seller and owner of the said screenings" or "knew or had notice that the plaintiff had the exclusive control of and right to sell the entire output of the mine" or if the defendants "by their actions after the purchase . . . treated the plaintiff as the defendants' creditor and as the seller of the whole amount of the screenings" then and in either of those conditions the verdict must be for the plaintiff for the full amount of its claim.

It is familiar law that a series of instructions are to be read as a whole, and a bad instruction may sometimes be explained and cured by others of the series if a verdict is not directed in the bad instruction, but if it is, that the error can not be cured by other contradictory instructions. Because of the opinion that because of these erroneous instructions the judgment should be reversed and the cause remanded for another trial, notwithstanding the fact that appellant is responsible for a part of the errors it here complains of.

A plaintiff argues that it was at least an undisclosed principal in the transaction and as such entitled to recover in this suit, and appellees say it appellant is an undisclosed principal it must accept the terms of its agent as it finds it and it McCullough as the agent of an undisclosed principal paid for power or his owner who coal belonged to appellant

that appellant cannot repudiate that part of the bargain.

This may be so, but we assume that on another trial definite knowledge will be furnished of the contract between appellant and McCullough, and so much depends upon that, that we cannot profitably indulge in speculation of what it may be and give directions as to the rights of the parties thereunder.

Appellant also contends that it is entitled to a verdict if the evidence shows that it is the assignee of a contract made by McCullough. We see no ground for that contention, the suit was not brought in the name of McCullough nor has appellant brought itself under the provisions of Section 18 of our Practice Act authorizing a suit by the assignee of a chose in action, not negotiable, in his own name.

Reversed and remanded.

that applicant cannot repudiate that part of the bargain.
This may be so, but a narrow and on another trial relative
knowledge will be furnished of the contract between applicant
and McCullough, and so much depends upon that, that we cannot
properly give it rise in speculation of what it may be and give
directions as to the rights of the parties thereunder.

Applicant also contends that it is entitled to a verdict if the
evidence shows that it is the assignee of a contract made by
McCullough. We see no ground for that contention, the suit
was not brought in the name of McCullough nor has applicant
brought itself under the provisions of Sect. 18 of our Practice
Act authorizing a suit by the assignee of a chose in action,
not negotiable, in his own name.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

5988

637

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:

Present--The Hon. ✓ DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. ✓ JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 193 I.A. 395

E. M. DAVIS, Sheriff.

RH Denied. July 7/✓

^{July}BE IT REMEMBERED, that afterwards, to-wit: on the ^{7th} ~~18th~~ day
of ^{June} ~~April~~, A. D. 1915, the opinion of the Court was ^{replied} filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

And now this is the first time that the Court has been called upon to decide upon the constitutionality of the act of the Legislature of the State of New York, passed in 1892, which provides for the appointment of a commission to inquire into the condition of the State of New York, and to report thereon to the Governor.

And now this is the first time that the Court has been called upon to decide upon the constitutionality of the act of the Legislature of the State of New York, passed in 1892, which provides for the appointment of a commission to inquire into the condition of the State of New York, and to report thereon to the Governor.

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And now this is the first time that the Court has been called upon to decide upon the constitutionality of the act of the Legislature of the State of New York, passed in 1892, which provides for the appointment of a commission to inquire into the condition of the State of New York, and to report thereon to the Governor.

And now this is the first time that the Court has been called upon to decide upon the constitutionality of the act of the Legislature of the State of New York, passed in 1892, which provides for the appointment of a commission to inquire into the condition of the State of New York, and to report thereon to the Governor.

Gen. No. 5988

James Savio et al appellees.

vs

Appeal from City Court.

Anton Vieno et al, appellants.

Spring Valley.

Dibell, J.

On November 29, 1913, James Savio and two others filed a bill in equity against Court Rose No. 12 of the Firresters of America, of Spring Valley, Illinois, of which complainants alleged they were ~~xxx~~ members, and against five persons alleged to be the treasurer, the financial treasurer, and the trustees of said Court Rose No. 12, wherein it was alleged that said Court Rose No. 12 was a local beneficiary society, a member of the Forresters of America, and subject to the constitution and by-laws of said body and of the Grand Court of Illinois of the Forresters of America; that at a certain special meeting, held on November 24, 1913, the majority of the members of said local body attempted to secede from the order of Forresters of America, and at a certain other meeting, held on January 24, 1914, they undertook to change the name of said local body; that the call for said November meeting did not comply with the rules of the order in certain respects set forth and was illegal and its action was void; that the said officers made defendant had possession of about \$1800 of the funds of said order, derived from the payment of dues by the respective members, and also of certain real estate of said local court, situated in the City of Spring Valley, and that said officers threatened either to convert the same to their own use or ~~to~~ to turn it over to the new order, which by said proceedings they have attempted to join; that by the laws of the order, in case of an attempted secession by any local body, if 15 or more members, including some one competent to preside, do not secede, (as was alleged to be the case here), they shall be the local body and shall be

to be the case here), they shall be the local body and shall be
some one competent to preside, do not secede, (as was alleged
secession by any local body, if it is or more members, including
to join; that by the laws of the order, in case of an attempted
the new order, which by said proceedings they have attempted
to convert the same to their own use or use to turn it over to
City of Spring Valley, and that said officers threatened seizure
of certain real estate of said local court, situated in the
from the payment of dues by the respective members, and also
had possession of about \$1800 of the funds of said order, derived
and its action was void; that the said officers made abundant
rules of the order in certain respects set forth and was this all
the call for said November meeting did not comply with the
1914, they undertook to change the name of said local body; that
America, and at a certain other meeting, held on January 24,
local body attempted to secede from the order of Foresters of
on November 24, 1913, the majority of the members of said
Foresters of America; that at a certain special meeting, held
laws of said body and of the Grand Court of Illinois of the
Foresters of America, and subject to the constitution and by-
Rose No. 12 was a local beneficiary society, a member of the
said Court Rose No. 12, wherein it was alleged that said Court
to be the treasurer, the financial treasurer, and the trustee of
alleged they were members, and against five persons alleged
of America, of Spring Valley, Illinois, of which complainants
shall in equity against Court Rose No. 12 of the Foresters
On November 23, 1913, James Savio and two others filed

Dibell, J.

Appeal from City Court.

James Savio et al. appellees.

No. 12888

entitled to all the property which belonged to the local body before the attempted secession, and that if there are not 15 such members refusing to secede, then said property shall belong to the Grand Court of the Order of Forresters of the State of Illinois; and that defendants have in their possession and intend to convert not only the said money and real estate, but also the charter, rituals, books, paraphernalia and costumes of said Court Rose. ~~The bill further alleged that the laws of the order did not furnish any adequate relief in such a case and that the complainants had no adequate remedy except in a court of equity.~~ The bill prayed that the acts of said meeting of November 24, 1913, be declared illegal, and for a temporary injunction restraining the defendants from disposing of said money, funds, and property till the further order of the court. An injunction without bond was ordered and was issued and served. Thereafter, by leave of court, complainants dismissed said bill as to one complainant, who had died, and as to defendant, Court Rose No. 12, and made Court Rose No. 12 a complainant, and filed an amended and supplemental bill, to which bill it made a new defendant, the Grand Court of Illinois of the Forresters of America. Thereafter by leave of court, complainants made other amendments, including an amended prayer which embraced the *as amended alleged that the laws of the order did not furnish adequate relief in such a case.* new defendant. The defendants, except the Grand Court, moved to dissolve the injunction. That motion was denied. The Grand Court filed an answer, admitting most of the allegations of the bill. The other defendants filed an answer, denying most of the allegations of the bill. The defendants, except the Grand Court again moved to dissolve the injunction, and this motion was denied. On August 4, 1914, the defendants, except the Grand Court, filed in said ~~San~~ City Court an appeal bond with security duly approved, by which they undertook to appeal to this court both from the order denying the motion to dissolve

entitled to all the property which belonged to the local body before the attempted secession, and that if there are not in such members retaining to secede, then said property shall go long to the Grand Court of the Order of Foresters of the State of Illinois; and that defendants have in their possession and intend to convert not only the said money and real estate, but also the charter, rituals, books, paraphernalia and costumes of said Court Rose. ~~The bill further alleged that the laws of the State did not require any notice to be given in such a case and that the complainant had no adequate remedy except in a Court of equity. The bill prayed that the use of said property of November 24, 1913, be declared illegal, and for a temporary injunction restraining the defendants from disposing of said money, funds, and property till the further order of the court. An injunction without bond was ordered and was issued and served. Thereafter, by leave of court, complainants dismissed said bill as to one complainant, who had died, and as to defendant, Court Rose No. 18, and made Court Rose No. 18 a complainant, and filed an amended and supplemental bill, to which bill it made a new defendant, the Grand Court of Illinois of the Foresters of America. Thereafter by leave of court, complainants made other amendments, including an amended prayer which provided that new amendments and that the laws of the State did not require any notice to be given in such a case, except the Grand Court, moved to dissolve the injunction. That motion was denied. The Grand Court filed an answer, admitting most of the allegations of the bill. The other defendants filed an answer, denying most of the allegations of the bill. The defendants, except the Grand Court, again moved to dissolve the injunction, and this motion was denied. On August 4, 1914, the defendants, except the Grand Court, filed in said Grand City Court an appeal from the security duly approved, by which they undertook to appeal to this court from the order denying the motion to dissolve~~

the injunction before answer and from the order denying the motion to dissolve the injunction after answer. The record of the case up to that point has been filed in this Court, and appellees moved to dismiss the appeal and we took that motion with the case.

Section 123 of the Practice Act permits an appeal from an interlocutory order overruling a motion to dissolve an injunction. Appellees contend that when appellants filed an answer after their first motion to dissolve was overruled, they thereby waived the right to appeal from the first order, and that, having elected to make a motion to dissolve before answer, they could not make another motion to dissolve the injunction before the final hearing and therefore the second motion was properly denied, and therefore the appeal should be dismissed. We are of opinion that the statute in question does not restrict a defendant to one motion to dissolve, but that he may move to dissolve both before and after answer, and may appeal from each adverse ruling of the trial court on such motions. The question whether two such appeals can be prosecuted together upon a single bond is not presented and we do not decide it. The answer filed by appellants was not made under oath, nor were any affidavits filed with said answer, and therefore the second motion to dissolve stood practically upon the same grounds as the first and presents the same questions. The motion to dismiss the appeal is therefore denied.

It is contended that the verifications of the original bill and of the amended and supplemental bill were defective and made those pleadings entirely upon information and belief, and that the court erred in subsequently permitting said verifications to be amended. We are of opinion that those objections to said verifications are not well taken under the authorities

the injunction before answer and from the order denying the motion to dissolve the injunction after answer. The record of the case up to that point has been filed in this Court, and appellees moved to dismiss the appeal and we took that action with the case.

Section 133 of the Practice Act permits an appeal from an interlocutory order overruling a motion to dissolve an injunction. Appellees contend that when appellants filed an answer after their first motion to dissolve was overruled, they thereby waived the right to appeal from the first order, and that, having elected to make a motion to dissolve before answer, they could not make another motion to dissolve the injunction before the final hearing and therefore the second motion was properly denied, and therefore the appeal should be dismissed. We are of opinion that the statute in question does not restrict a defendant to one motion to dissolve, but that he may move to dissolve both before and after answer, and may appeal from each adverse ruling of the trial court on such motions. The question whether two such appeals can be presented together upon a single bond is not presented and we do not decide it. The answer filed by appellants was not made under oath, no affidavits were filed with the answer, and therefore the second motion to dissolve stood practically upon the same grounds as the first and presents the same question. The motion to dismiss the appeal is therefore denied.

It is contended that the verifications of the original bill and of the amended and supplemental bill were defective and made those pleadings entirely upon information and belief, and that the court erred in substantially permitting said verifications to be amended. We are of opinion that those objections to said verifications are not well taken under the authorities

cited by us in *Stephenson v Porter* Ill. App. (opinion filed January 6, 1915) and that ~~those affidavits were~~ ^{there was} an absolute verification of all the allegations of the bill and of the amended and supplemental bill, except such allegations as were therein expressly stated to be upon information and belief, and that the main features of the case made by said pleadings were positively alleged. ^{In another respect the verification} ~~not in the usual form, but we understood that the form used was legal & valid~~ The motions for leave to file an amended and supplemental bill and the subsequent amendments did not ask that said action be without prejudice to the injunction. This point was not raised in the court below, where said orders for leave to amend could have been amended in that respect. This was not assigned in the court below as a reason why the injunction should be dissolved. In fact appellants really contend that by the course taken the injunction was dissolved. In such a case, in *Craig v Craig*, 175 Ill. App. 176, we held that amendments so made which did not change the allegations of the bill, except to enlarge and strengthen them, did not affect the force of the injunction. The main purpose of the amendments was to make the allegations of the bill more specific and to set out in the bill in detail various laws of the order, the legal effect of which only had been stated in the original bill. We conclude that the injunction should not be dissolved because the court did not expressly order that said amendments should be without prejudice to the injunction.

It seems clear to us that the bill states a case justifying and requiring the court to enjoin these officers to retain in their possession the money, real estate and other property of the local court until a hearing upon the merits or until the further order of the court. We are of opinion that where the corporate body is made a party to the suit, a member of such a body may maintain such a suit for the pro-

acted by us in *Stephenson v Porter* 111. App. (opinion filed January 6, 1915) and that ~~the facts were~~

an absolute verification of all the allegations of the bill and of the amended and supplemental bill, except such allegations as were therein expressly stated to be upon information and

belief, and that the main features of the case made by said pleadings were positively alleged. ~~In matters not the subject of the bill, the court was not to take notice of the facts and circumstances.~~ The motions for leave to file an amended and supplemental

bill and the subsequent amendments did not ask that said action be without prejudice to the injunction. This point was not

raised in the court below, where said orders for leave to amend could have been amended in that respect. This was not assigned

in the court below as a reason why the injunction should be dissolved. In fact appellants really contend that by the course

taken the injunction was dissolved. In such a case, in *Craig v Craig*, 175 Ill. App. 176, we held that amendments so made

which did not change the allegations of the bill, except to enlarge and strengthen them, did not affect the force of the

injunction. The main purpose of the amendments was to make the allegations of the bill more specific and to set out in the

bill in detail various laws of the State, the effect of which only had been stated in the original bill. It is contended

that the injunction should not be dissolved because the court did not expressly order that said amendments should be without

prejudice to the injunction.

It seems clear to us that the bill states a case justifying and requiring the court to enjoin these officers to

retain their possession of the money, real estate and other property of the local court until a hearing upon the merits

or until the further order of the court. We are of opinion that where the corporate body is made a party to the suit,

a member of such a body may maintain such a suit for the recovery

tection of his financial interests therein, under the principles laid down in *Bruschke v Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, and in the authorities there cited. The complainants except Court Rose No. 12, show themselves to be members of the local body and contributors to the fund in the hands of the appellants, and state a case *prima facie* showing an attempted secession of the majority of the members of said local court and of its officers from that body to another ~~body~~ society and an intention to carry with them this money and property, and states a *prima facie* case that said attempted secession was illegal and that there are enough members who did not consent thereto so that said members remain the local court and entitled to said property, and that if there are not enough such members, then said property belongs to the Grand Court of Illinois and not to said officers, the appellants. We deem it unnecessary to state in detail the many allegations contained in the complainants' pleadings. If, as suggested, appellants should require the use of some of said funds to meet expenses of the local court, the order for an injunction does not prevent their applying ~~xxx~~ to the court for any necessary modification.

The orders appealed from are affirmed.

section of his financial statement therein, under the principles
 laid down in *Bruscha v. Der Nord-Ostsee-Schiffahrts-Verein*, 145
 Ill. 433, and in the authorities there cited. The complainants
 except Court Case No. 12, and themselves to be members of the
 local body and contributors to the fund in the hands of the
 appellants, and state a case prima facie showing an attempted
 secession of the majority of the members of said local court
 and of its officers from that body to another *hush* society and
 an intention to carry with them this money and property, and
 states a *prima facie* case that said attempted secession
 was illegal and that there are enough members who did not con-
 sent thereto so that said members remain in the local court and
 entitled to said property, and that if there are not enough
 such members, then said property belongs to the Grand Court
 of Illinois and not to said officers, the appellants. We deem
 it unnecessary to state in detail the many allegations con-
 tained in the complainants' pleadings. If, as suggested, appel-
 lants should require the use of some of said funds to meet ex-
 penses of the local court, the order for an injunction does not
 prevent their applying *hush* to the court for any necessary modifi-
 cation.
 The orders appealed from are affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

5989 638
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and fifteen,
within and for the Second District of the State of Illinois:
Present--The Hon. [✓]DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

193 I.A. 398

AP - N Denied July 7/15 ✓

BE IT REMEMBERED, that afterwards, to-wit: on the ¹¹~~15~~th day
of ^{June}~~April~~, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Amended & refilled June 25, 1915

Gen. No. 5989

Thomas Caveglia, et al appellees.

vs

Appeal from City Ct. Spring

Anton Vieno, et al appellants.

Valley.

Dibell, J.

On May 14, 1914, Thomas Caveglia and between 60 and 70 others, who alleged themselves to be members of Court Rose No. 12, Forresters of America, of Spring Valley, Illinois under the jurisdiction of the Grand Court of Illinois, Forresters of America, filed a bill in equity against five persons, whom the bill alleged to be the treasurer, financial treasurer, and the trustees of said Court Rose No. 12. The bill was in its main features like the amended and supplemental bill discussed by us in Savio v Vieno Gen. No. 5988 in which we file an opinion this day. A like injunction was granted and served. Thereafter by leave of court, an amendment to said bill was filed. Defendants moved to dismiss the cause for the reason that the bill had been filed without the consent of certain persons named as complainants, and affidavits were filed by each of said persons denying that he ever authorized his name to be used as complainant in such suit, and averring that it was being prosecuted without his knowing knowledge or consent. The court permitted complainants to discontinue their suit as to all the complainants so named, except Pietro Riva, and then denied the motion to dismiss the suit. Thereafter another amendment to the bill was filed, and defendants moved to dissolve the injunction and said motion was denied. Complainants filed an amendment to the bill, making the Grand Court, Forresters of America, of the State of Illinois, a defendant, and said Grand Court answered and the other defendants answered, and said other defendants again moved to dissolve the injunction and that motion was denied, and said defendants, except the

Thomas Cavaglia, et al appellants.

Appeal from City of Spring Valley.

Anton Vreno, et al appellants.

Disbel, J.

On May 14, 1914, Thomas Cavaglia and between 60 and

70 others, who alleged themselves to be members of Court

Rose No. 12, Foresters of America, of Spring Valley, Illinois

under the jurisdiction of the Grand Court of Illinois, Foresters

of America, filed a bill in equity against five persons, whom

the bill alleged to be the treasurer, financial treasurer, and

the trustees of said Court Rose No. 12. The bill was in the

main features like the amended and supplemental bill discussed

by us in Savio v Vreno Gen. No. 2283 in which we filed an opinion

this day. A like injunction was granted and served. Thereafter

by leave of court, an amendment to said bill was filed. De-

endants moved to dismiss the cause for the reason that the

bill had been filed without the consent of certain persons

as well as complainants, and affidavits were filed by each of said

persons denying that he ever authorized his name to be used as

complainant in such suit, and averring that it was being pro-

secuted without his knowledge or consent. The court

permitted complainants to discontinue their suit as to all the

complainants so named, except Pietro Hiva, and then denied

the motion to dismiss the suit. Thereafter another amendment

to the bill was filed, and defendants moved to dissolve the

injunction and said motion was denied. Complainants filed an

amendment to the bill, asking the Grand Court, Foresters of

America, of the State of Illinois, a defendant, and said Grand

Court answered and the other defendants answered, and said

other defendants again moved to dissolve the injunction and

that motion was denied, and said defendants, except the

Grand Court, filed a bond, appealing from said two orders refusing to dissolve said injunction, and said bond was approved and the record has been filed in this court. Appellee moved to dismiss the appeal and we deny that motion. Most of the questions raised are similar to those passed upon in the other case, and our holding is the same as in that case for the same reasons.

Appellants contend that the injunction should have been dissolved and the bill dismissed because of the pendency of the other suit, which a plea filed by appellants avers is by the same complainants against the same defendants. This statement is manifestly incorrect in part, because there are about 60 members, complainants in this suit, who apparently have rights which they are entitled to protect, and who are not parties to the other suit. But, further, said plea had not been put at issue nor tried. The mere filing of the plea did not entitle appellants to a dismissal of the bill. The record contains no certificate of the evidence heard upon the motion to dismiss the bill because filed without the consent of certain persons named as complainants. The affidavits copied into the record by the clerk cannot be considered by this court without being embodied in a certificate of evidence. *Lange v Heyer*, 195 Ill. 420, *Bellinger v Barnes*, 223 Ill. 121. It may have been shown that Pietro Riva did consent to become a complainant, or that he had been indemnified against costs, or that in some other way the right to use his name had been acquired. Upon this record it must be presumed the court properly refused to dismiss the bill and properly retained Pietro Riva.

Court Rose No. 12 is not a party to this suit, either as complainant or defendant. We are satisfied that it is a necessary party, for the reasons stated in *Bruetschke v Der Nord Chicago Schuetszen Verein* 145 Ill. 433.

Grand Court, filed a bond, appealing from said two orders refusing to dissolve said injunction, and said bond was approved and the record has been filed in this court. A motion moved to dismiss the appeal and as duty that motion, least of the questions raised are similar to those passed upon in the other case, and our holding is the same as in that case for the same reasons.

Appellants contend that the injunction should have been dissolved and the bill dismissed because of the redundancy of the other suit, which a plea filed by appellants was in by the same complainants against the same defendants. This statement is manifestly incorrect in part, because there are about 60 members, complainants in this suit, who apparently have rights which they are entitled to protect, and who are not parties to the other suit. But, further, said plea had not been put at issue nor tried. The mere filing of the plea did not entitle appellants to a dismissal of the bill. The record contains no certificate of the evidence heard upon the motion to dismiss the bill because filed without the consent of certain persons named as complainants. The affirmative copied into the record by the clerk cannot be considered by this court without being embodied in a certificate of evidence. Lange v. Meyer, 195 Ill. 480, Bellinger v. Barnes, 253 Ill. 121. It may have been shown that Pistro River did consent to become a complainant, or that he had been intimidated against coming, or that in some other way he was not to use his name had been admitted. Upon this record it must be presumed the court properly refused to dismiss the bill and properly retained Pistro River. Court Case No. 17 is not a party to this suit, either as complainant or defendant. We are satisfied that it is a necessary party, for the reasons stated in Brutsche v. De Wolf, Chicago Southern Varsity 145 Ill. 425.

The orders appealed from are therefore reversed and the cause is remanded ~~with directions to the court below to permit complainants to amend by making Court Rose No. 12 either a complainant or a defendant, and if they do not within a reasonable time after the cause is reocketed in the court below, take that action, then to dissolve the injunction and to dismiss the bill.~~

Reversed and remanded ~~with directions.~~

The orders appealed from are therefore reversed and

~~the cause is remanded with costs to the appellant.~~

~~It is so ordered.~~

~~Very respectfully,~~

~~Wm. H. Taft, Chief Justice.~~

~~John H. Ely, Clerk of the Court.~~

Reversed and remanded with costs.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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(3 d Dist)

640

4/ Denied April 7th 1916

Gen. No. 6196.

October Term, 1914-
Filed Dec. 11, 1914-

Agenda No. 1-

The O.H. Paddock Lumber Co.,

Appellee.,

VS.

; Appeal from City Court of Pana.

The Western Union Telegraph Co.,

Appellant.,

193 I.A. 416

Opinion by Thompson, P.J.

This is an action in case brought by ^{against} the appellee to recover damages from ~~appellant~~ on account of a mistake in the transmission of a telegram, sent to ^{the plaintiff} ~~appellee~~ by the Louisville Cement Company, quoting the price on 3000 barrels of cement. On the trial the appellant did not offer any evidence. ^{and} The court at the close of ~~appellee's~~ evidence directed a verdict in favor of ~~appellee~~ ^{the plaintiff} for \$300. on which judgment was rendered. ^{and the defendant appeals}

The ^{plaintiff} ~~appellant~~ on May 4, 1910, in reply to a letter, sent ^{the plaintiff} ~~appellee~~ quoting the price at \$1.64 per barrel. The telegram as delivered ^{read} ~~quoted~~ the price at \$1.54. ^{the plaintiff} ~~appellee~~, without notice of the mistake and relying on the telegram, ^{in court and} resold the cement to a customer at \$1.72 per barrel and on May 7, wired its ^{and} acceptance of the offer. ^{and} The sale at \$1.72 was based on the purchase price at \$1.54 contained in the telegram as changed. The Louisville Cement Company refused to furnish the cement at \$1.54 and ^{the plaintiff} ~~appellee~~ in order to protect its contract with its customer was compelled to pay \$1.64 per barrel for the 3000 barrels of cement, which were delivered to it to carry out its contract with its customer.

There is no controversy or dispute as to the facts. The evidence clearly shows that the appellee lost ten cents per barrel on the cement by reason of the change in the telegram as delivered.

854.21291

When a message announcing prices, sent in contemplation of a trade is erroneously transmitted, the party injured may recover the amount of the loss caused by the increase in price he was obliged to pay in consequence of the error. (Western Union Telegraph Co., vs. Dupois, 128 Ill. 248; Western Union Telegraph Co., vs. Packing Co., 188 Ill. , 366) or where there is a profit which would have been larger but for the error in transmission he may recover the decrease in the profit which would have been realized. (27 A.E. Encyc. of Law 1068; 37 C. Y.C. 1770).

While the suit is to recover damages for negligence , the amount of the damages is shown with certainty; but there was no evidence showing any defence, and there was no error in directing the verdict; the judgment is therefore affirmed.

A F F I R M E D .

Filed Dec. 11, 1914-

641

M.H. Wilson,
Appellant.,

VS.

Appeal from Pike.

Thomas McVay, et al.,
Appellees,

193 I.A. 417

Opinion by Thompson, P.J.

~~E.H. Wilson, a resident of the city of Hannibal, in the State of Missouri,~~ filed a bill in chancery against Thomas McVay, Bert McVay and G.H. Redman ~~praying~~ for an accounting concerning commissions realized from the sale of a farm sold by defendants for a third party. The bill alleges that complainant ~~in 1913~~, was engaged in buying and selling Illinois and Missouri lands for commission and profit and that ~~in 1913~~, one A.L. Coan, who ~~resides in Texas and owned 311 acres of land in Pike County, Illinois, listed said land with complainant, for sale at \$20,000; that complainant was to have for his commission all that he could sell the land for in excess of \$20,000; that the McVays are real estate agents, in Pike County, Illinois; that the McVays and complainant entered into a contract under which, McVays should find a purchaser for said lands and that the commission or profits derived from the sale of said lands should be equally divided:--one half to McVays and the remaining half to complainant; that the McVays conspired with G.N. Redmond to make a sale of said lands and appropriate to themselves the entire profit; that defendants made a sale of said lands to one George Donne for the consideration of a mortgage of \$14,000. on said lands and divers sums of money and goods and merchandise of great value; that complainant had demanded an accounting from the defendants and that the defendants wrongfully refused to account to complainant and assert that he has no interest in the profits received from said sale. The bill waives the oath to the answer.~~

The defendants ~~demurred~~ to the bill on the ground that it ~~does~~ not set forth facts requiring the interposition of a court of equity, and that the complainant ~~has~~ a full and adequate remedy

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at law. The court sustained the demurrer and dismissed the bill. *And*

The complainant appeals.

complainant contended
~~The contentions of appellant are that this is a bill for~~ *he has one*
discovery, and an accounting between partners.

The bill does not ask for any discovery either directly or indirectly. All that is asked for in the prayer is that an account be taken of the moneys and other things of value received by defendants and that they be required to pay etc. The body of the bill alleges that a sale was made for a total consideration which is not precisely known to complainant. There is neither any direct allegation, nor any allegation of facts showing that any discovery is necessary to a recovery by complainant. The bill is not framed to give a court of equity jurisdiction on the ground that a discovery is necessary to a correct accounting. *County of Cook vs. Davis*, 143 Ill. 151. The bill cannot be held to be a good bill on the ground that it is a bill for discovery.

The bill sets forth a single joint transaction; there was no contract which would render either of the parties liable for any loss or expense of the other, the contract as set forth is wholly lacking in the elements necessary to constitute a partnership. The only claim is that defendants refuse to turnover to complainant one half the commission realized as profits from the sale.

"A contract whereby a real estate dealer employs a person to assist him in the sale of land on the agreement that he is to receive one half of the profits, after deducting necessary expenses, for any land sold to buyers brought to the dealer directly or indirectly through the others efforts does not as between parties create a partnership irrespective of their intention".
Reed vs. Engle, 237 Ill. 631.

From the statements in the bill this is a case where the parties are entitled to a jury trial according to the course of the common law. A trial at law will afford an adequate and ample remedy.

"When a court of law is competent to afford an adequate and ample remedy a court of equity will remit the parties to a court of law , where the right of trial by jury is secured to them. In such cases either party has a right to demand that the matter of the defendant's liability be submitted to a jury according to the course of the common law". Winkler vs. Winkler, 40 Ill. 179; County of Cook vs. Davis, 143 Ill. 151; Douglas vs. Martin, 103 Ill., 25; Fuller vs. Davis Sons, 184 Ill. 505; Gove vs. Kramer, 117 Ill. 176.

As a general rule, if there is a doubt as to whether a court of equity has jurisdiction , it is better in all cases of doubtful character presenting a conflict of evidence, that the parties should be remitted to whatever remedy they may have at law although equity might entertain jurisdiction. Hacken vs. Barten, 84 Ill., 313; Wing vs. Sherer, 77 Ill., 200.

There being an adequate and complete remedy at law and no discovery sought, the court properly sustained the demurrer and dismissed the bill.

The decree is affirmed.

A F F I R M E D .

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

193 I.A. 423

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in OCTOBER A. D. 19 14

PRESENT

HONORABLE GEORGE W. THOMPSON, Presiding Justice

HONORABLE EDGAR ELDREDGE, Justice

HONORABLE WILLIAM B. SCHOLFIELD, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 11th day of

DECEMBER, A. D. 19 14, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:

OF THE

PROCEEDINGS OF THE

1906

1906

1906

1906

1906

1906

1906

1906

1906

1906

1906

1906

F I L E D
DEC 11 1914
Geo. L. Tipton CLERK
APPELLATE COURT 3rd DIST.

En. No. 6273.

October Term 1914.

Ag. 10.

Cornelius B. Keller, Jennie Zimmerman,
Elenora K. Martin, and Grace Bach,
Appellees.

vs.

Appeal from Christian.

Charlie W. Keller, John H. Keller, Mary
A. Keller and William T. Vandever,
(Charles W. Keller and William T. Vande-
veer,

Appellants).
Statement.

This is a bill for partition filed by appellees against appellants alleging the tenancy in common of complainants and defendants in certain real estate described therein; the existence of certain mortgage indebtedness, and that the real estate, except two described town lots, is in the possession of appellee, Charles W. Keller, under a certain article of agreement for farming said lands dated March 1, 1913. The bill prays for a partition according to the respective rights of the parties. Copies of the mortgages and the farming contract, which by its terms terminates March 1, 1914, are attached to the bill and made a part thereof. The article of agreement is "between Charles W. Keller, Jennie Zimmerman, J. H. Keller, Elenora Martin, Grace Bach and C. B. Keller, being the heirs of J. B. Keller deceased, parties of the first part, and Charles W. Keller individually party of the second part", and is signed by all of them under seal. The contract describes the land and states that the parties being desirous of farming said lands for profit agree to pay said second party for the management and conducting the same as follows:- said second party shall reside on said land,

FILED
DEC 11 1914
Geo. W. Little, Clerk
APPELLATE COURT AND DIST.

18. 10.

October 1914

18. 10.

Gornellius B. Keller, Janice Zimmerman,
Elinore K. Martin, and Grace Beach,
Appellees.

Appellate Court.

vs.

Charles W. Keller, John E. Keller, Mary
E. Keller and William T. Vandover,
(Charles W. Keller and William T. Van-
der, Appellants).

Agreement.
Statement.

This is a bill for partition filed by appellants against appellees.

and the agency in common of appellants and appellees in certain

estate described therein; the existence of certain mortgage interests

, and that the real estate, except two described town lots, is in the

possession of appellees, Charles W. Keller, under a certain article of agree-

ment for farming said lands dated March 1, 1911. The bill asks for a

partition according to the respective rights of the parties. Copies of

mortgages and the farming contract, which by its terms terminates March 1,

1915, are attached to the bill and make a part thereof. The article of

agreement is "between Charles W. Keller, Janice Zimmerman, J. E. Keller,

Elinore Martin, Grace Beach and C. E. Keller, herein the heirs of J. E. Keller

and appellees of the first part, and Charles W. Keller individually and

as "second part", and is signed by all of them under seal. The contract

states the land and states that the parties being desirous of farming

the lands for profit agree to pay said second party for the mortgage and

making the same as follows:-- said second party shall receive an undivided

farm and manage the same to the best of his ability, rotating the crops as season requires, and make such repairs and improvements on the land as may be necessary. It is further agreed that the parties of the first part "will furnish one half of the necessary personal property with which second party is to farm said lands; and second party agreed to furnish one half of all the personal property necessary for conducting said farm and said personal property is to be owned by first parties and second party in common." The "second party is to furnish and pay the expense of all labor necessary for successfully conducting said lands and feeding and raising live stock;". Neither of the parties are to keep any stock on the farm not owned by them in common; the second party is to devote his entire time to carrying out of this contract; "it is further stipulated and agreed between the parties hereto that this contract is to be in force one year from the date hereof, to wit: until March 1st, 1914, at which time the same may be terminated and the property owned in common disposed of by either of the parties hereto giving thirty days notice in writing, if not terminated, then it may be renewed by the mutual agreement of the parties hereto. In the event of termination of said contract and the inability of the parties hereto to agree as to the disposition of the personal property on hand, then the same is to be sold at public sale within thirty days after notice is served by either party upon the other party and the proceeds of said sale, after deducting the expenses thereof, divided between the parties according to their respective rights and interests herein set forth." The foregoing is followed by a stipulation that

and change the name to the best of his ability, holding the same as
ion requires, and take such repairs and improvements as may be
necessary. It is further agreed that the parties of the first
"will furnish one half of the necessary personal property which
party is to farm said land, and second party agrees to furnish one
of all the personal property necessary for the operation of the same and
personal property is to be owned by first party and second party in
one." The "second party is to furnish and pay the expenses of all
necessary for successfully conducting the same and furnish and
the live stock." Whether of the parties are to keep any stock on
the not owned by them in common; the second party is to devote his
time to carrying out of his contract; it is further understood
between the parties hereto that this contract is to be in force
year from the date hereof, to wit: until March 1st, 1904, at which
the same may be terminated and the terms agreed in writing between
by either of the parties hereto giving thirty days notice in writing.
if not terminated, then it may be renewed by the mutual agreement of
parties hereto. In the event of termination of said contract and the
ability of the parties hereto to agree as to the disposition of the same
property of hand, then the same is to be sold at public sale within
thirty days after notice is served by either party upon the other party
the proceeds of said sale, after deducting the expenses thereof, divided
between the parties according to their respective shares as hereinbefore
stated set forth." The foregoing is followed by a declaration that

und H. Bach shall act as the representative of the parties of the first
t and a stipulation as to how the bank account shall be kept and checked
inst and the moneys arising from sales deposited and the profits divided.

The defendants answered the bill admitting the ownership alleged
denying that the contract for occupancy of the farm expired on March 1,
4, and asserting that the parties had renewed the contract for another
r and agreed to make a written memorandum thereof and that the defendants
executed such written memorandum and that C. W. Keller, relying on said
reement, had sown 70 acres of winter wheat and purchased a large number
cattle for fattening and had done other things towards carrying out the
tract for another year and asks, if partition be decreed, that it be made
ject to the right of occupancy in furtherance of said partnership contract
another year, and that the interests of the defendants be set off jointly.

The court found the interests of the parties as set up in the bill
that under the contract Charles W. Keller is entitled to the possession
that portion of the farm lands upon which he had sown wheat in the fall
1913, amounting to approximately seventy acres of land until said wheat
matured and harvested, but as to the balance of said lands his right of
session expires March 1, 1914.

The court decreed a partition of the premises subject to the liens
the mortgages, and the right of Charles W. Keller to retain the 70 acres
which wheat was sown until the wheat was harvested in 1915, the interests
Charles W. Keller and John Keller to be set off together if partition
uld be made.

The defendants appeal and assign for error that the court should

and B. Each shall act as the representative of the other in the future and a stipulation as to how the same shall be done and executed. It is the intent of the parties that the same shall be done and executed.

The defendant answered the bill stating the facts as alleged and denying that the contract for occupancy of the land as stated in the bill.

and asserting that the parties had entered into a contract for occupancy of the land as stated in the bill.

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and asserting that the parties had entered into a contract for occupancy of the land as stated in the bill.

re decreed that C. W. Keller had the right to occupy all said farm lands until March 1, 1915. The complainants have assigned cross errors in that the court erred in decreeing that C. W. Keller should hold possession of the land sowed to wheat until the same is harvested. No question is raised concerning the findings of the court as to the title or the mortgages on the premises.

Union by Thompson, P. J.

The only questions raised on this appeal are concerning or subject to what right of possession of the defendants the partition should be made. The contract bearing date March 1, 1913, which is signed by all the parties is not a contract of leasing but a partnership agreement. This is conceded by all the parties to this suit. No question of landlord and tenant is involved. The defendants do not contend that there was any agreement to extend said contract for another year beginning March 1, 1914, but their contention is that because stock was bought in the fall of 1913, and that the defendant Charles W. Keller bought cattle to feed and sowed fall wheat on part of the land with the knowledge and consent of the husbands of the female complainants that there was an extension of the contract of partnership for a year by implication. The evidence shows that in September 1913, there was over 150 acres of pasture on the land that was going to waste and for that reason cattle were bought by Charles W. Keller, with the approval of the husbands of complainants, to feed, but that there was no talk of any extension of the contract.

Elenora Martin testified that she never made any statement to either

Charles W. Keller or John H. Keller that the contract should be extended for another year and that that subject was never discussed with her. The testimony of Mrs. Zimmerman and Mrs. Balch is to the same effect, although these witnesses all say their husbands acted for them. The proof shows that the seed wheat was bought and paid for out of the partnership funds. That that was done was consistent with and under the partnership agreement.

Subsequently to the beginning of the suit for partition the defendants signed an agreement for the extension of the contract of March 1, 1913, for another year; this agreement was dated back to November 1, 1914; and was not signed by any of the complainants. This latter agreement can not have any effect on the rights of the complainants.

Whatever was done was in performance of the partnership contract and no sufficient reason appears why the partnership could not be settled as of March 1, 1914 as a year later. The wheat and the stock were partnership property and whatever rights the parties had could be settled when the partnership should be settled and under the contract it was to end March 1, 1914, unless an agreement should be made for its extension. The court did not err in holding that the defendants were not entitled to continue the partnership and hold the possession of the lands after March 1, 1914, but did err in holding that Charles W. Keller was entitled to hold possession of the land sown to wheat until it should be harvested. The case is reversed and remanded at the costs of appellants with directions to the trial court to enter a decree in conformity with the views herein expressed.

Reversed and Remanded with directions.

[illegible]

I, ROBERT L. CONN, Clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the OPINION OF SAID COURT in said cause as the same appears from the records and files of my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court,
at Springfield, Illinois, this 19th day of July 1961




Clerk Appellate Court, Third District.

GENERAL NO. 6273

ornelius B. Keller et al.,

Appellees,

vs.

Charlie W. Keller et al.,

Appellants.

State of Illinois
APPELLATE COURT
Third District

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in OCTOBER A. D. 1914

PRESENT

193 I.A. 426

HONORABLE GEORGE W. THOMPSON, Presiding Justice

HONORABLE EDGAR ELDREDGE, Justice

HONORABLE WILLIAM B. SCHOLFIELD, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 11th day of

DECEMBER, A. D. 1914, there was filed in the office of the said Clerk of said Court,

an opinion of said Court, in words and figures following:



F I L E D
Dec. 11, 1914
Geo. L. Tipton, Clerk
Appellate Court 3rd Dist.

General No. 6275 October Term 1914

Ag. 12

W. O. Edwards, Administrator of)
Estate of Lonnie Arthur, deceased,)
 Appellee.)
 vs.)
George W. Negley, Appellant.)

Appeal from Vermillion.

Opinion by Thompson, P. J.

This action was brought by the administrator of Lonnie Arthur, deceased, to recover damages for the benefit of the next of kin resulting from the alleged wrongful death of the deceased. A verdict for \$362.50 was returned by a jury, on which judgment was rendered. The defendant appeals.

Lonnie Arthur was a child four years old living with his parents in a house owned by appellee at the northwest corner of a block. The lot was surrounded by a fence. In the rear of the lot was a fence separating the lot from an alley running north and south through the block. The street running east and west on the north side of the block is known as Gregg Street. The lots, in the block in which the Arthurs lived, lying west of the alley were vacant except that they were used by appellee for storing logs for a saw mill of his on property west of the block. The lot immediately west of the lot the Arthurs lived on is lot 24.

FILED
Dec. 11, 1914
Geo. L. Ripston, Clerk
Appellate Court 2nd Dist.

Dec. 12

October Term 1914

General No. 6275

W. O. Edwards, Administrator of
Estate of Lonnie Arthur, deceased,
Appellee.
vs.
George W. Negley,
Appellant.

Opinion by Thompson, P. J.

This action was brought by the administrator of Lonnie Arthur, deceased, to recover damages for the benefit of the next of kin resulting from the alleged wrongful death of the deceased. A verdict for \$62.50 was returned by a jury, on which judgment was rendered. The defendant appeals.

Lonnie Arthur was a child four years old living with his parents in a house owned by appellee at the northwest corner of a block. The lot was surrounded by a fence. In the rear of the lot was a fence separating the lot from an alley running north and south through the block. The street running east and west on the north side of the block is known as Gregg Street. The lots, in the block in which the Arthurs lived, lying west of the alley were vacant except that they were used by appellee for storing logs for a saw mill of his on property west of the block. The lot immediately west of the lot the Arthurs lived on is lot 24.

North of Gregg street and in line with the fence in the rear of the lot the Arthurs lived on was a barn in which the Arthurs kept a pony. There was a fence along the south side of Gregg street. There was a gate in the fence on the north side of lot 24 and a small gateway into the alley in the rear of the Arthur lot. The evidence tends to show that the end of the alley near Gregg street was somewhat obstructed with logs and that in order to drive in with coal and other supplies to the Arthurs and other tenants east of the alley, teams drove from Gregg street through the gate on the north side of lot 24, then east to the alley and down the alley.

The evidence also tends to show that on the day of the death of Lonnie Arthur, George Arthur, a brother of Lonnie, with Lonnie went to feed the pony in the barn and after that was done, George went west on Gregg street leaving Lonnie on Gregg street near the gate, and that Lonnie started to go through the gate and across lot 24 to go home. The evidence further tends to show that a day or so before the death of Lonnie, an employee of appellant, while at work skidding logs on lot 24, had left the frame of a truck made of 6x6 oak timbers about six feet long, with cross pieces three or four feet long, to which were attached iron axles, reared up nearly perpendicular against the fence or one of the gate posts.

North of Gregg street and in line with the fence in the rear of the lot the Arthurs lived on was a barn in which the Arthurs kept a pony. There was a fence along the south side of Gregg street. There was a gate in the fence on the north side of lot 24 and a small gateway into the alley in the rear of the Arthur lot. The evidence tends to show that the end of the alley near Gregg street was somewhat obstructed with logs and that in order to drive in with coal and other supplies to the Arthurs and other tenants east of the alley, teams drove from Gregg street through the gate on the north side of lot 24, then east to the alley and down the alley.

The evidence also tends to show that on the day of the death of Lonnie Arthur, George Arthur, a brother of Lonnie, with Lonnie went to feed the pony in the barn and after that was done, George went west on Gregg street leaving Lonnie on Gregg street near the gate, and that Lonnie started to go through the gate and across lot 24 to go home. The evidence further tends to show that a day or so before the death of Lonnie, an employee of appellant, while at work skidding logs on lot 24, had left the frame of a track made of six oak timbers about six feet long, with cross pieces three or four feet long, to which were attached iron spikes, tamped up nearly perpendicular against the fence on one of the gate posts.

It is claimed by appellee that the lot with logs on it with the truck as reared up was an attractive nuisance and that Lonnie pulled over this frame weighing about 350 pounds, and that it fell on him and killed him. George Arthur testifies that he told Lonnie to go home, and that he, George, had gone a few feet west when he looked around and saw Lonnie with the truck lying on him.

George Arthur, the brother of Lonnie, testified that the truck was reared up by the fence, the lower side of it about a foot from the fence, when they went past it on the way to feed the pony, and that after he told Lonnie to go home and Lonnie started through the gate, and when he, George, had gone a few feet he looked around and saw Lonnie lying on the ground with the truck on him and that he lifted the truck off Lonnie and put it back against the fence, moved Lonnie a short distance and ran to the house for his mother. A number of witnesses who arrived there in a few minutes say the truck was lying on the ground a few feet from Lonnie. The little boy was killed by a fracture of the skull. The employees of appellant testify the frame of the truck was in a safe condition and that the little boy could not have pulled it over upon himself. Several witnesses testify that children of tenants of appellant living just east of the alley were frequently playing in the log yard with the knowledge of appellant.

The question of the cause of the death of the little boy and whether it was caused by an attractive nuisance on the

It is claimed by appellee that the lot with logs on it with the truck as reared up was an attractive nuisance and that appellee pulled over this frame weighing about 350 pounds, and that it fell on him and killed him. George Arthur testifies that he told Lornie to go home, and that he, George, had gone a few feet west when he looked around and saw Lornie with the truck lying on him. George Arthur, the brother of Lornie, testified that the truck was reared up by the fence, the lower side of it about a foot from the fence, when they went past it on the way to feed the boy, and that after he told Lornie to go home and Lornie started through the gate, and when he, George, had gone a few feet he looked around and saw Lornie lying on the ground with the truck on his head and that he lifted the truck off Lornie and put it back against the fence, moved Lornie a short distance and ran to the house for his brother. A number of witnesses who arrived there in a few minutes say the truck was lying on the ground a few feet from Lornie. The little boy was killed by a fracture of the skull. The employees of appellee testify the frame of the truck was in a safe condition and that the little boy could not have pulled it over upon himself. Several witnesses testify that children of tenants of appellee living just east of the alley were frequently playing in the log yard with the knowledge of appellee. The question as to the cause of the death of the little boy and whether it was caused by an attractive nuisance on the

premises of appellant negligently placed there by the appellant or his employees were questions of fact for the jury to be decided from the evidence in the case.

It is contended that George Arthur, who was the father of the deceased, was an incompetent witness in the case for the reason that he and his wife being next of kin were both beneficiaries and parties in interest. The objection in the record is:- "I object to the testimony of this witness on the ground that he and his wife would be beneficiaries they are parties in interest". The objection is not on the ground that he was incompetent because he was the husband of one of the beneficiaries. It is a correct proposition of law that a wife is not a competent witness for a husband although she is interested in the event of the suit where the husband is interested. Thomas vs. Anthony, 261 Ill. 288; Schreffler vs. Chase, 245 Ill. 395. Under section one of the Evidence Act, all disqualifications of a witness to testify by reason of being an interested party are removed except as subsequently stated. Under section five of the act, no husband or wife shall be rendered competent to testify for or against each other as to any transaction x x x and except "when the litigation shall be concerning the separate property of the wife." The husband was competent to testify in any case where the wife is not interested. The interest the wife has in the case, if a judgment is recovered, is her separate property. The husband has the right

premises of applicant negligently placed there by the defendant
of his employees were questions of fact for the jury to be decided
from the evidence in the case.

It is contended that George Arthur, who was the father of
the deceased, was an incompetent witness in the case for the
reason that he and his wife being next of kin were both com-
petent and parties in interest. The objection in the second
instance: "I object to the testimony of this witness on the ground
that he and his wife would be beneficiaries they are parties in
interest". The objection is not on the ground that he was in-
competent because he was the husband of one of the beneficiaries.
It is a correct proposition of law that a wife is not a competent
witness for a husband although she is interested in the event of
the suit where the husband is interested. Thomas vs. Anthony,
281 Ill. 283; Schaeffer vs. Chase, 285 Ill. 295. Under section
one of the Evidence Act, all disqualifications of a witness to
testify by reason of being an interested party are removed except
as subsequently stated. Under section five of the act, no husband
or wife shall be regarded competent to testify for or against each
other as to any transaction in which he and except "when the litigation
shall be concerning the separate property of the wife." The
husband was competent to testify in any case where the wife is not
interested. The interest the wife has in the case, if a judgment
is recovered, is her separate property. The husband has the right

to testify for or against his wife in a suit where the separate property of the wife is involved, except that he may not testify concerning conversations. We conclude therefore that the husband was a competent witness on his own behalf and that of his wife.

It is also contended that the court erred in admitting a plat of the premises in evidence showing the streets and alleys, because there was no evidence showing an acceptance by the city of Danville. The evidence is that the streets shown in the plat are used by the public and improved. The witnesses for the appellant, in their testimony, frequently speak of Gregg street and the alley. There was no error in the ruling.

The third instruction given at the request of appellee is abstract and very misleading. It is an argument on what constitutes the preponderance of evidence as between a single witness on one side and four or five witnesses on the other. It concludes "when you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds". The preponderance of evidence does not necessarily satisfy the mind of the juror. If the jury believe that a fact is established by the greater weight of the evidence it is proved by a preponderance of the evidence. The appellees first instruction is also abstract and argumentative.

to testify for or against his wife in a suit where the property of the wife is involved, should be not testify concerning conversations. He concludes therefore that the husband was a competent witness on his own behalf and that of his wife. It is also contended that the court erred in admitting a list of the witnesses in evidence showing the adverse and allys, because there was no evidence showing an opportunity by the city of Louisville. The evidence is that the streets shown in the list are used by the public and improved. The witnesses for the appellant, in their testimony, frequently speak of Gregg street and the allys. There was no error in the ruling. The third instruction given at the request of appellee is incorrect and very misleading. It is an argument on what constitutes the preponderance of evidence as between a single witness on one side and four or five witnesses on the other. It concludes when you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds. The preponderance of evidence does not necessarily satisfy the mind of the juror. If the jury believe that a fact is established by the greater weight of the evidence it is proved by a preponderance of the evidence. The appellee first instruction is also abstract and argumentative.

The appellee's fourth tells the jury that the master of a servant is chargeable with the injurious consequences of the servants acts done in the masters service and within the scope of his employment and if the jury believe from the evidence that the dangerous condition alleged in the declaration was caused by the acts of a servant of the defendant while in his service and in the scope of his employment, the defendant is bound by such acts. This instruction is very imperfect and misleading when considered in connection with the different counts in the declaration.

The sixteenth instruction requested by appellant informed the jury that if they believed from the evidence that the mother of the deceased was guilty of contributory negligence in permitting the child to go about the premises in charge of his older brother, or that his older brother so in charge was guilty of negligence that in any way contributed to the injuries of the child, then although you may believe from the evidence that the defendant was guilty of some negligence in connection therewith, yet the defendant would not be liable herein.

When the suit is to recover for the benefit of the next of kin, the instruction states a correct proposition of law. True & True Co. vs. Woda, 201 Ill. 313; Chicago City Ry. vs. Wilcox, 138 Ill. 370, and cases therein cited; City of Pekin, 154 Ill. 141. While the appellate court of the Fourth District in Donk Bros. Coal & Coke Co. vs. Leavitt, Admr., 109 Ill. App. 385, announced

The appellate court tells the jury that the master of a
servant is chargeable with the injuries consequent upon the
servant's acts done in the master's service and within the scope of
his employment and if the jury believe from the evidence that the
dangerous condition alleged in the declaration was caused by the
acts of a servant of the defendant while in his service and in the
scope of his employment, the defendant is bound by such acts.
This instruction is very imperfect and misleading when considered
in connection with the different counts in the declaration.
The sixteenth instruction requested by appellant informed
the jury that if they believed from the evidence that the mother
of the deceased was guilty of contributory negligence in permitting
the child to go about the premises in charge of his older brother,
or that his older brother as in charge was guilty of negligence
that in any way contributed to the injuries of the child, then
although you may believe from the evidence that the defendant was
guilty of some negligence in connection therewith, yet the
defendant would not be liable herein.
When the suit is to recover for the benefit of the next of
kin, the instruction states a correct proposition of law. True &
True Co. vs. Woda, 201 Ill. 313; Chicago City Ry. vs. Wilcox,
138 Ill. 370, and cases therein cited; City of Pekin, 154 Ill.
141. While the appellate court of the Fourth District in North Bros.
Coal & Coke Co. vs. Leavitt, Adam., 109 Ill. App. 393, announced

the rule as contrary to the instruction requested in the case at bar and the Supreme Court of this state does not appear to have been called upon to necessarily pass upon the identical question involved, yet it has in general expressions decided the question adversely to the holding in the Donk Bros. Coal & Coke Co. case. The refusal of this instruction was error.

The appellant's fourteenth and fifteenth refused instructions, which undertook to announce the law as to attractive nuisances, while containing several correct principles, yet they were properly refused because of requiring the proof to show that the premises were vacant. While the first count of the declaration avers the lots were vacant, it also alleges that they were occupied by logs stored thereon, so that the averments are contradictory and the allegation of vacant lots was immaterial. The fifteenth informs the jury that the defendant had a right to use said premises as he saw fit unless they believe from the evidence that the truck was of itself such an attraction to said child that it appealed to his childish instincts. The first count of the declaration avers that said lots were vacant and used for the storage of logs and trucks and attractive to children, and that said child was attracted by said logs and trucks to said premises and by reason of said dangerous condition of said truck etc. Under other counts of the declaration, the lots were alleged to be attractive and

the rule on necessity in the instruction requested in the case
as to and the Supreme Court of this case does not appear to
have been called upon to necessarily pass upon the identical
question involved, yet it has in several instances decided the
question adversely to the holding in the Park Lane, Good & Co. Co.
case. The refusal of this instruction was error.

The appellant's fourth and fifteenth refused instructions,
which undertook to introduce the law as to attractive nuisances,
while containing several correct principles, yet that were properly
refused because of repeating the point to show that the premises
were vacant. While the third count of the declaration were the
facts were stated, it also alleged that they were occupied by John
Edward Nelson, so that the events are contradictory and the
application of vacant lots was impossible. The fifteenth instruction
the jury that the defendant had a right to use said premises as
he saw fit unless they believe from the evidence that the truck
was of itself used in connection in said child that it appeared to
his childish instincts. The first count of the declaration were
that said lots were vacant and used for the storage of logs and
timber and attractive to children, and that said child was
attracted by said logs and timber to said premises and by reason
of said dangerous condition of said truck etc. Under other counts
of the declaration, the lots were alleged to be attractive and

the child was killed by the dangerous position of the truck. The instruction ignores the allegation that the lots were attractive and limits the attraction to the truck. For the reasons stated there was no error in refusing the fourteenth and fifteenth instructions. For the errors indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

The child was killed by the dangerous position of the train. The
instruction ignores the allegation that the facts were deceptive
and limits the attraction to the child. For the reasons stated
there was no error in refusing the testimony and judgment.
Instruction. For the error indicated the judgment is reversed
and the cause remanded.

Reversed and Remanded.

I, ROBERT L. CONN, Clerk of said Appellate Court, do hereby certify the foregoing to be a true
of the OPINION OF SAID COURT in said cause as the same appears from the records and files of my

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court,
at Springfield, Illinois, this 19th day of July 19 61

A handwritten signature in dark ink, appearing to read "Robert L. Conn", is written over a horizontal line.

Clerk Appellate Court, Third District.

GENERAL NO. 6275

W. O. Edwards, Admr., etc.,

Appellee,

vs.

George W. Negley,

Appellant.

State of Illinois

APPELLATE COURT

Third District

to van Antwerp
1-7-49
Gen. No. 6283-

October Term, 1914-

645
Ag. No. 16-

Filed Dec. 11, 1914-

The People, ex rel.

Emeleco Norbanta,
Appellee.,

VS.

;

Appeal from County Court of

Andrew Lucas,
Appellant.

Macoupin.

645
193 I.A. 431

Opinion by Thompson, P. J.

This is a prosecution on a charge of bastardy. A verdict was returned finding the defendant to be the father of the bastard child of the relatrix on which judgment was rendered. The defendant appeals.

It is earnestly urged that the verdict is clearly against the weight of the evidence. It is contended that the relatrix was impeached by her own testimony given on her cross-examination. She is a young girl sixteen years of age in April, 1913. She did not speak English and her evidence had to be given through an interpreter. The jury saw her on the witness stand and believed her story.

The evidence was very conflicting with no manifest preponderance either way. It would serve no useful purpose to review it in this opinion. The trial court approved the verdict and no sufficient reason is shown why this court should say that the verdict and judgment are not sustained by the evidence.

It is further contended that the trial court erred in sustaining an objection to the question:- "Ask her if she will tell the jury that she never did have sexual relations- improper relations with any other man between August 13, 1912, and October 6, 1912, than she has told about"? The objection was that the question had already been answered, and a reference to the record shows that it had been answered in substance in various forms several times. There was no error in the ruling.

for the support and maintenance of the bastard child of the prosecuting witness. This is followed by a concrete statement of the law applicable to the case. The first part of the instruction while it states a correct proposition of law gives the jury no information concerning any issue submitted to it. We fail to see how it could affect the jury in any way and the introduction to the instruction was harmless error. People vs. McKeown, 171 Ill., App. 146. Finding no reversible error in the case, the judgment is affirmed.

Affirmed.

647

Gen. No. 6301. October Term, 1914- Ag. 28-
Filed Dec. 11, 1914-

John W. Hankins,
Appellee-

VS. -;; Appeal from Sangamon.

St. Louis & Springfield Ry. Co.,
Appellant.

193 I.A. 437

Opinion by Thompson, P.J.

This is an appeal from a judgment recovered by appellee, John W. Hankins, against appellant, the St. Louis and Springfield Railway Company, in an action to recover damages for personal injuries. The declaration contains two counts. The first count avers that appellee was a passenger and that appellant was negligent in having an unlighted trailer and failed in its duty to give appellee a reasonable opportunity to alight and pass behind the car on which he was a passenger. The second count avers that the relation of carrier and passenger had terminated and that appellee was lawfully on a public street and that appellant was negligent in failing to equip and operate its trains so as to avoid injuring persons lawfully on the streets.

The evidence shows that appellee was on April 3, 1914, a passenger on a car of appellant's interurban railway from Carlinville and intended to alight at the corner of Third and Monroe Streets in Springfield. The car arrived in Springfield about 8:30 P.M. There was a trailer, in which there were no lights attached to the passenger car before it arrived in Carlinville. The Chicago and Alton Railroad has its tracks on Third Street in Springfield and the double tracks of the interurban cross the tracks of the Alton R.R. at the said street intersection. The car on which appellee rode to Springfield was running east on Monroe Street as it approached the railroad crossing. This intersection is not a regular place for passengers to alight although they habitually get off there; there are no facilities for passengers alighting there.

When the car with the attached trailer reached the crossing, it stopped and the conductor got off and went ahead to see that the crossing was clear; the appellee got off the car facing south at the south side intending to cross the tracks behind the car to go to a rooming house at the north west ~~side~~ corner of this street intersection. Appellee testified that when the car started east he turned and started walking in the same direction expecting it to pass him and after walking a short distance he turned and walked north, walking in between the car and the trailer or against the train. He was knocked down by the trailer and had a rib broken. He testified that he had frequently ridden over the same route and never knew of a trailer being attached and did not know one was on that night. When he got off the car he could have seen the trailer but says he did not look. There was an electric light burning on the corner of Third Street inside the gate line of the Alton Railroad, and there were lights on both ~~xi~~ ends of the train. A large number of witnesses testified concerning the car and trailer ~~and~~ that the trailer was plainly and clearly visible. One excuse ~~given~~ by appellee for not seeing the trailer, in addition to the fact that he did not look, is that the brilliant electric lights further east in the business part of the city, toward which the car was going and he was walking, shone in his eyes and dazzled him so that he did not see the trailer; in other words his complaint is that the city furnished too much light at this point. The physician who was called to attend appellee says that he was somewhat under the influence of liquor. After appellee had alighted from the car on a public street he was not a passenger. It is elementary that in order to recover for damages for personal injury caused by negligence, the plaintiff must prove that he was in the exercise of due care at the time he was injured. The clear preponderance of the evidence shows that appellee was not in the exercise of due care but was guilty of gross negligence in blindly attempting to walk over a moving train. The judgment will be reversed with a finding of fact that the appellee was not in the exercise of due care when ~~the~~ was injured.

R E V E R S E D.

648

Gen. No. 6304.

October Term, 1914-

Ag. No. 31-

Filed Dec. 11, 1914-

193 I.A. 439

Elmer O. Neff,
Appellee.,

VS.

; Appeal from Tazewell.

Harwood Barley Mfg. Co.,
Appellant.,

Opinion by Thompson, P.J.

This is an action in assumpsit brought by Elmer O. Neff, of Pekin, Illinois, against the Harwood Manufacturing Company, an Indiana corporation engaged in the manufacture and sale of motor trucks, to recover a commission for trucks sold by the defendant, the purchasers of which were introduced to defendant by plaintiff and on which the plaintiff claims the defendant agreed to pay a commission of twenty-five per cent of the selling price. The declaration contains ~~the common~~ counts and a special count on an oral contract of agency. The plea is the general issue. A jury returned a verdict in favor of plaintiff for the sum of \$1137.50 on which judgment was rendered. The defendant appeals.

The principal contention of appellant ^{was} ~~is~~ that appellee was not an agent of appellant. In August, 1913, Appellant sent a printed circular to appellee to which was attached a postal card that appellee filled out by stating thereon that he was interested in a one ton truck and requesting that appellant's agent call on him and mailed the card to appellant. The appellant on receipt of the card mailed to appellee a catalogue of its motor trucks. This catalogue on its first page under the heading "Officers and Directors" named C.G. Barley as Treasurer and General Manager, and on the last page under the heading "Agencies and Service Stations" names among others W.F. Breedlove, Joplin, Missouri.

1881.4.133

On September 2, 1913, after appellee had mailed the card to appellant, he received a letter from appellant signed by Charles G. Bailey, Treasurer. The last paragraph of this letter is:-

"We are referring your inquiry to our Mr. Breedlove, who will be in your vicinity soon, and he can call on you as he can give you the fullest information regarding the price, etc. He is desirous of seeing you about the agency of our truck in your vicinity, as we can save you some money by making you our agent. We can furnish a one ton truck with stake body in about three weeks after receipt of your order, four at the outside".

The appellant at the time it wrote the letter to appellee also forwarded the card written by appellee to Breedlove. The day after appellant wrote its letter to appellee, Breedlove wrote a letter to appellee stating that he was in receipt of his card which had been referred to him, and that he (Breedlove) would call on appellee the following week and take the matter up with him and it would pay appellee ~~in~~ well to wait for him. At the time fixed in the letter Breedlove went to Pekin and met appellee. The evidence for appellee is that Breedlove, as agent for appellant, proposed to appellee that appellant would pay him a commission of twenty-five ~~marks~~ per cent on the sale of motor trucks to such prospective buyers as appellee might introduce Breedlove; that appellee ~~agreed~~ to take Breedlove to prospective purchasers and introduce him on that basis, and thereafter on that day did introduce Breedlove to Albertson & Koch, who purchased a truck on September 9, from appellant. He also took Breedlove and introduced him to the German American Brewing Company, which also bought a truck from appellant. After the introduction of Breedlove to Albertson & Koch, and the Brewing Company, appellee and Breedlove went to a bank in Pekin and there Breedlove told the cashier, in appellee's presence that Breedlove wanted to make appellee agent for appellant and told him what the commission was and figured out the commission he would get if a sale should be made to Albertson & Koch, and to the German American Brewing Company. The evidence of appellee and the cashier

of the bank is that appellee was to have the commission agreed upon if Albertson and Koch and the Brewing Company purchased trucks, and that during the conversation in the bank he suggested that Breedlove close the sales to Albertson & Koch and the German American Brewing Co. before Neff gave his order and that Breedlove assented to this proposal. Appellee testifies that he was not asked to sign an order for a truck but that he did give an order for a truck to be shipped to him on condition that Albertson & Koch and the Brewing Company bought trucks.

Appellee^{ant} contends that it was necessary for appellee to purchase a truck and to advance \$200. on it before he could be appointed an agent. Appellee proved that he had between \$1,200. and \$1,400. in the bank at the time Breedlove and he were at the bank, and that he was not asked to advance \$200.)

The preponderance of the evidence is that it was agreed that the commission he would get if the sales to Albertson & Koch and the Brewing Company should be made, would be applied on his purchase. Appellant subsequent to that time refused to ship a truck to appellee, and claims that Albertson & Koch had been appointed agents for the sale of its trucks.

There is a conflict between the evidence of appellee and Breedlove but appellee is corroborated by the cashier of the bank.

Appellant insists also that Breedlove had no authority to appoint agents except on the condition that the proposed agent should first buy a truck and advance \$200. on it. The letter of September 2, written by the Treasurer and General Manager of appellant informs appellee that "our Mr. Breedlove" "is desirous of seeing you about the agency of our truck in your vicinity", and places no limitation on Breedlove's right and authority to appoint agents. Breedlove acted within the apparent scope of his authority, ~~in appointing agents~~ as the same is shown by the letter of its General Manager, in appointing appellee an agent, although he may have acted contrary to his private instructions. The appellant received the benefit of the work of appellee done under the

agency created by appellant under the authority it notified appellee it had reposed in Breedlove. Appellant cannot defeat the right of one of its agents to a commission by making agents of customers introduced by an agent already appointed. The jury were justified under the evidence in finding a verdict in favor of appellee.

Appellant also argues that appellee's instruction number seventeen is erroneous for the reason "it assumes Neff made a contract with a duly authorized agent of appellant". The instruction cannot be so construed, it states "if you find from the greater weight of the evidence that the defendant acting by its duly authorized agent,, agreed", etc.

Two other instructions are also criticised but we find no ground for the complaints urged against them.

The jury were fully and fairly instructed. Finding no error the judgment is affirmed.

A F F I R M E D .

R.H.

Pullman Institution
Feb 3-1915

658

Gen. No. 6321.

October Term, 1914-

Ag. No. 43-

Filed December 11, 1914-

Peter Coutrakon and Gus Keresotes,
Partners, etc.,

Appellants.,

VS.

Appeal from Sangamon.

Passow & Sons., a corporation.,
Appellees.

193 I.A. 447

Opinion by Thompson, P.J.-

This is an action in assumpsit brought by Coutrakon and Keresotes, partners, against Passow & Sons, a corporation, to recover \$400. part payment made by plaintiffs on a soda fountain, which defendant agreed to build for plaintiffs, according to the terms and specifications of a written contract, for \$1,800. and which was to be delivered to plaintiffs on or about May 1, 1913. ~~The declaration consists of the common counts.~~

The defendant filed a plea of the general issue with a notice of set off claiming a balance of \$1,400. due on the original contract together with \$ 245.80 additional made up of items of interest, storage and freight, etc. A jury returned a verdict of \$1,400. ^{was found} in favor of defendant, on which judgment was rendered, ^{and} The plaintiffs appeal.

The written order for the fountain was made March ~~24~~ 26, 1913, and by its terms ^{the defendant} Passow and Sons of Chicago, agreed to manufacture and ship ^{it} the fountain on or about May 1, subject to delay on account of strikes or other unforeseen accidents; to Coutra-
kon & Keresotes at Springfield, Illinois, and to furnish a mechanic to set it up. The freight is to be paid by the purchasers and settlement is to be made on arrival of goods at Springfield, terms \$800. cash, balance of \$1,000. payable in sixty days with interest, the title to remain in ^{the defendant} Passow & Sons until notes and chattel mortgage have been executed by the purchasers. The purchasers made an advance payment of \$400. when the order was signed.

Time was not made the basis of the contract

Among other provisions of the specifications is:- "Pump section. There are to be two 10 pump sections, each to have 10 porcelain syrup jars, 7 pumps, liquid style, x x x". Contra~~tion~~ testified that in a conversation with appellee's ~~agent~~ agent before the contract was signed it was agreed that the pumps should all be liquid carbonic pumps made by the Liquid Carbonic Company. The fountain was not shipped on May 1st. Appellants insist that they cancelled the contract because the fountain was not shipped on or about May 1st, and that they are entitled to recover the advance payment .

On April 21, appellee wrote to appellants that on account of some unforeseen conditions that had arisen it would not be able to ship the fountain on the first of May. On April 28, appellee wrote to appellants that it expected to ship the outfit within the next ten days. On May 17, appellants wrote to appellee that they had rescinded the contract and demanded the return of the \$400. Appellants employed Mr. McGrath, an attorney, in Springfield, to act for them in the matter. On May 19, appellee wrote to McGrath that it was ready to ship the fountain and requesting appellants to comply with the contract as to the further sum of \$400. the balance of the cash payment. On May 20, appellee wrote to McGrath the fountain would be shipped the next day. McGrath communicated with appellants, his clients, and by their direction on May 21, sent a telegram to appellee "send fountain under terms of original contract except the \$1,000 to be paid July 26th, and \$400. more when fountain is in store". The fountain was shipped May 21st, and on May 24th appellants wired appellee that the fountain was in Springfield, and that they would accept it but wished to change the terms of the old contract as to payment. On May 22nd- appellee sent the bill of ~~lading~~ lading with a note and chattel mortgage to a bank in Springfield. On May 24th, appellee wrote to McGrath that they had sent the papers and note and mortgage to the First National Bank for \$1,000. due July 26, and that they held a carpenter in readiness to set up the outfit. On May 26, appellee received another letter from McGrath stating that the fountain and fixtures would be accepted if as represented. Appellants refused to accept the

fountain and fixtures which remained at the freight depot in Springfield until September when the outfit was returned to appellee in Chicago.

Appellants contend that they cannot be required to accept the outfit and pay for it because (1) it was not shipped on or about May 1; (2) that appellee failed to furnish a mechanic to set it up; (3) the connections were not properly matched; the workmanship was poor and the mahogany veneering loose; (4) the tanks were not as called for by the specifications and (5) the pumps were not the kind made by the Liquid Carbonic Company.

While the contract called for the shipment of the outfit "on or about May 1, x x x subject to delay on account of strikes or other unforeseen accidents" time is not made the essence of the contract, and ^{The Plaintiffs} appellants directed the outfit shipped about the time it was forwarded. The delay was caused by the failure of the Marble works ~~xxxx~~ that manufactured certain onyx columns on the fountain to have them cored, the evidence is uncertain as to whether that was the fault of the Marble Works or the appellee. Appellants having directed the outfit shipped on May 21, and written May 26, that it would be accepted if it was as represented, and they would pay the further sum of \$400. when the outfit was in their store and pay \$1,000. on July 26, obligated themselves to accept it if it fulfilled the specifications. The appellants were by the contract required to pay the freight, and all that appellee had to do after it was shipped was to furnish a mechanic to properly set it up. The provision in the contract is "Contractor to furnish mechanic at their expense to set up the outfit, purchaser furnishing helpers". It is very clear that appellants are not in a position to urge any defence to the claim of set off on the ground that it was not shipped on or about May 1,.

^{The Plaintiffs} Appellants inspected ^{the fountain} it on its arrival in Springfield and say it was not as represented. The contract contains the clause

"all claims for shortage or non-compliance with contract must be made within five days of delivery of goods". ^{Plaintiff's} Appellants do not appear to have given any notice within five days of what they now insist was a non-compliance with the contract other than the question of time. *The evidence as*

~~With reference to the other defences urged to the set off, the evidence is conflicting. There is ^{very} no manifest preponderance either way, and it would not serve any useful purpose to review it at length. The finding of the jury and its approval by the trial court is conclusive on those questions.~~

~~While complaint is made of two instructions concerning the question of delay in the shipment, we see no error in them that requires a reversal of the case.~~

~~It is also insisted that the court should have granted the motion for a new trial on the ground of newly discovered evidence. The evidence which is claimed to have been discovered since the trial is, simply cumulative on the question of the kind of pumps that were furnished in the fountain. ^{which} It would not necessarily have changed the verdict, and ^{which was} is not conclusive on the question of the kind of pumps in the fountain.~~ *was denied.*

~~It ^{was claimed} is argued that the verdict ^{was} is a compromise and if ^{Swiss} ^{defendant} appellee was entitled to a judgment on its set off it was entitled to all that it claimed. The fact that the judgment is for less than appellee was entitled to is an error of which appellants have no reason to complain.~~

Finding no error in the case the judgment is affirmed.

AFFIRMED.

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Rehearing Denied May 26th, 1915.--Opinion ^{modified} and refiled June 29th, 1915.

GENERAL NO. 6207. APRIL TERM, A. D. 1914. AGENDA NO. 63.

by

EULALA MCCORMICK, et al.,
Appellees,

Filed April 16, 1915-

vs.

Appeal from Circuit Court
Shelby County.

against

J. H. DECKER, et al.,
Appellants.

193 I.A. 451

ELDREDGE, P. J.

~~Appellees recovered a judgment against appellants~~ ^{the defendant}

in the sum of \$6,000 ~~as~~ an action under Section 9 of the Dram Shop Act, for an injury in their means of support caused by the death of their father resulting from habitual intoxication produced by liquors sold to him by appellants. *Plaintiffs* and *the latter appeals*
Three errors are ~~principally~~ relied upon by appellants

~~as reasons~~ for the reversal of the judgment: ~~These relate,~~
first to the admission of evidence, second to the giving of instructions and third to the remarks of counsel in the arguments to the jury.

The cause of action alleged in the declaration is confined solely to injuries received by appellees in the loss of their means of support, caused by the death of their father

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in consequence of intoxication through liquors sold to him by appellants. ~~Under the declaration no damages can be recovered in this case by appellees except such as have accrued to them by reason of their loss in their means of support.~~ The Court, over objection, permitted the mother of appellees to testify, that, prior to the time deceased began to drink to excess, his demeanor and conduct towards appellees was very kind, but that after he began to so use intoxicating liquors, and while he was under the influence thereof, his habits with reference to attention, care, watchfulness and service to the children were very careless and that he paid very little attention to them. ~~It has been held that mental anguish, disgrace or loss of society and companionship are not proper elements of damage in a suit to recover for injuries in means of support, under this section of the statute.~~ Freese v Tripp, 70 Ill. 496; Meidel v Anthis, 71 Ill. 341; Brantigan v While, 73 Ill. 561. ~~In the case of Hackett v Shelsley, 77 Ill. 109, in a similar action brought by the wife for damages in her means of support, she was permitted, over objection, to testify that when her husband came home intoxicated he would get angry and throw the dishes; that she had to go out of the house into the cold in the winter to escape injury from him; that he made demon-~~

strations to her with a revolver and once held it to her head,

In the opinion the Court held:

"The statute gives the right of action for three separate descriptions of injury--injury in person, or property, or means of support.

As the declaration in this case counted only upon an injury in means of support, the evidence should have been confined to such injury, and it was error to admit this evidence of personal injury and ill treatment; and it was such evidence as was highly calculated to operate injuriously to the defendants."

In the case of Hanewacker v Ferman, 152 Ill. 321, where the cause of action was confined to injury in means of support, evidence of the inconvenience that the plaintiff labored under, as to the hardships she suffered, and as to the sickness of her children, was held to be incompetent. To the same effect is also Flynn et al v Fogarty, 106 Ill. 263. In the case of McLees v Niles, 93 Ill. App. 442, in an action brought by the wife to recover damages for injury in her means of support, the admission of evidence that her husband when intoxicated was abusive and cross was held to have been erroneous.

In view of the settled law in this State in an action of this character where the cause of action is confined strictly

to injury in means of support, proof of conduct to the wife or children by the husband or father while intoxicated is incompetent and the admission of such evidence is erroneous.

Such error cannot be cured by an instruction limiting the damages to such as apply only to the injury in means of support. *Hackett v Smelsley, supra; McLees v Niles, supra.* It follows, therefore, that the evidence of the conduct of the father to appellees before and after he acquired the habit of excessive drinking was erroneously admitted.

A

The witness ~~Bertner~~ on cross-examination was asked by *where he was* counsel for appellees the following question, "were you convicted ~~in court~~ for selling intoxicating liquors during the year 1909--1910?" *and* To this he answered that he had been convicted ~~at the~~ *in* ~~last March Term of court~~ 1913, four years later than the date in controversy. It is contended by appellants that evidence of the conviction of a crime by a witness for the purpose of affecting his credibility must be shown by the record and judgment of the conviction. This is not the rule in this State. Proof of the conviction of an infamous crime for the purpose of impeaching the testimony of a witness may be proved like any other fact and may be admitted by the witness himself. *Clifford v Pioneer Fire Proofing Company, 232 Ill. 150.* Selling intoxicating liquors

is not an infamous crime, nor any crime at all, unless it is done contrary to the laws of the State. If this question was asked solely for the purpose of impeaching the testimony of the witness on the ground that he had been convicted of an infamous crime, the objection should have been sustained. The answer, however, was not responsive to the question, was voluntary, and, as no motion was made to exclude it, appellants are not now in position to assign error thereon.

Numerous checks drawn by deceased and payable to the various appellants were admitted in evidence upon the statement of counsel for appellee that further evidence would be produced to prove that they were given in payment for intoxicating liquor sold by them, respectively, to the deceased. A number of these checks bear date at a time when there were no licensed saloons in Shelbyville, where deceased and appellants resided, and while appellants were conducting other kinds of business, and with possibly one exception, they were not connected by any

~~evidence with sales of liquor to deceased. Nor was there any evidence showing sales of intoxicating liquors, legally or illegally, by the payees of the checks during this period, and under such circumstances, they should not have been admitted.~~

~~The giving of the first and sixth instructions on behalf of appellees is assigned as error. (The first instruction is a verbatim copy of all that portion of said Section 2 which~~

has any application to the case. It is insisted that the instruction is bad because it did not set out the entire section, ~~under the authority of Baker & Reddick v Summers, 201 Ill. 52;~~ Colesar v Star Coal Co., 255 Ill. 532; and, Hapenny v Huffman, 184 Ill. App. 351. The complaint is that under this instruction the jury would be warranted in awarding all damages sustained by appellees and would not be limited to the damages sustained by them in their means of support. In each of the above cases cited on this question, there was no other instruction limiting the damages to the loss in the means of support, but in the ~~present case the jury could not have been misled as to the measure of damages.~~ It was instructed to consider all the instructions together as a series. ^{and by other} By the ~~sixteenth,~~ ~~seventeenth and eighteenth~~ instructions given on behalf of appellants, the jury were ~~plainly~~ told that they could not find appellants, or either of them, guilty unless appellees proved by the evidence that they had been injured in their means of support, and the damages were limited solely to such as they suffered in their means of support. ~~Under these circumstances, the giving of this instruction was not reversible error as the jury could not have been misled thereby.~~ Jeffries v Alexander, 266 Ill. 49; Danley v Hibbard, 222 Ill. 83;

~~Colesar v Star Coal Co., supra.~~

The sixth instruction given for appellees is objected to on the ground that the damages are not limited to those sustained by appellees in their means of support. If this was the only instruction given on the measure of damage we would be inclined to sustain the contention, but taking the instructions as a whole, as we have above stated, the jury could not have been misled as to the true rule to be applied in the assessment thereof.

Instruction number 10 given on behalf of appellees is ~~not complained of, but as this case must be tried again we desire to call attention to it so that the error may not be repeated.~~

~~The instruction attempts to define the weight and credit that should be given to the witnesses in the case, and concludes as follows: "and you should give to the testimony of such witness, if any there be, only such weight and credit as you shall believe him entitled to under all the circumstances surrounding the case."~~

A jury has no right to consider any facts and circumstances except such as are shown by the evidence, but under this instruction the jury was allowed to discredit the testimony of any witness upon any facts and circumstances which might come to their

knowledge from any source. The giving of an instruction which permits a jury to consider facts and circumstances not shown by the evidence is reversible error. *Balenovic v Ansick*, 181 Ill. App. 660.

The Court refused to give a number of instructions asked by appellants, but we are of opinion there was no error committed in this regard.

~~Numerous remarks made by counsel for appellees in their arguments to the jury were objected to, but we will here notice but one, which was made in the closing argument and was as follows:~~ *this to the jury said that*

"The intoxicating liquors sold to McCormick caused his death, and defendants are murderers." ~~This statement was objected to, but the Court made no ruling thereon.~~ A litigant in a court of law has a right to have the issues considered and determined by a jury from the evidence and the law pertaining thereto, and not by passion and prejudice produced by inflammatory remarks of counsel. Verdicts procured by such means will not be sustained.

For the errors indicated, the judgment is reversed and the cause remanded.

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GENERAL NO. 8226.

OCTOBER TERM, A. D. 1914.

APPEAL NO. 2.

Filed April 16, 1915-

JOSEPH LATTUS,

Appellee,

vs

ILLINOIS MIDLAND COAL COMPANY,

Appellant.

Appeal from Circuit
Court Sangamon County.

193 I.A. 454

ADDRESS, P. J.

This is an appeal from a judgment rendered against
appellant for the sum of \$10,000 in an action on the case to
recover damages for personal injuries alleged to have been sus-
tained by appellee because of the wilful violation by appellant
of "Clause B", Sec. 21 of the Mines and Miners Act as amended in

1911. This clause was as follows:

requiring place of

refuge

"(2)

On all hauling roads or gangways ^{in mines} ~~on which~~

~~no hauling is done by drift animals, or gangways where men are obliged to be in the performance of their duties or have to pass to and from their work, places of refuge must be provided in the mine at least two and a half feet high, four feet wide and five feet in height, and not more than twenty yards apart; but such places shall not be required in or near the~~

1000, 1000, 1000

1000, 1000, 1000

~~exceeding twenty yards and thereafter there is a clear
space of two and one-half feet between the car and the
piling, such space shall be deemed sufficient for the passage
of men. All places of refuge must be kept clear
of obstructions and no material shall be stored nor
be allowed to accumulate therein."~~

There is no controversy about the facts ~~surrounding~~
~~the accident.~~ Counsel for appellant agreed on the trial in
open court that there had been a violation of the statute as
alleged in the declaration and introduced no evidence. The
facts disclosed by ~~the evidence introduced by appellee are~~
substantially the same as they appear on a former appeal of
this case (181 Ill. App. 197) ~~and need not be repeated herein~~
it is conceded ~~on this appeal~~ by counsel for appellant, in ~~their~~
~~argument,~~ that appellee at the time of the injury was acting
within the scope of his employment. The principal contentions
now urged are, that the lack of the places of refuge was not
the proximate cause of the injury, errors in the admission of
evidence, in the giving of instructions and that the damages are
excessive. ~~We held in our former opinion that under the facts~~
~~as disclosed by the evidence shown by the record on that appeal,~~
~~the question whether the failure to provide places of refuge~~

a car much ^{more} ~~directly~~ ^{by reason of} ~~to~~ ^{not being able}
 mile too ~~to~~ ^{to} ~~was~~ ^{was} ~~assisting~~ ^{assisting}
 to wrap it for my car.

a car much ^{more} ~~directly~~ ^{by reason of} ~~to~~ ^{not being able}
 mile too ~~to~~ ^{to} ~~was~~ ^{was} ~~assisting~~ ^{assisting}
 to wrap it for my car.

It is claimed the Court erred in admitting evidence that the assistant mine manager directed appellee to go into this entry and help ~~and~~ the driver of the mule team. It is conceded that it was the duty of appellee to do this without any direct or specific order. ~~He failed to see the force to the contention that appellant was harmed by evidence that appellee was directed to do that which it was his duty to do. His direction or order was simply an incident shown in the development of the facts leading up to the accident and was part of the res gestae.~~

Error is assigned to the alleged admission of evidence that the injury to the prostate gland would cause a lessening of tone, would impair vitality and vigor and affect the power of procreation. An examination of the abstract shows that counsel for appellant are mistaken in regard to this as no such evidence was admitted.

is because
~~The only objection made to the instructions is to the first one given for appellee. This is on the ground that it instructs the jury that neither the doctrine of assumed risk nor contributory negligence can be introduced as a defense to the case without defining those terms, and also because it assumes that appellant was relying upon improper defenses.~~
that

The instruction might well have been refused as the elements of assumed risk and contributory negligence did not, under the pleadings and proofs, in any way enter into the case. But if it had also defined these terms, this fact would not have helped the instruction any, or have been of any more advantage to appellant, because, as stated, the questions of assumed risk and contributory negligence were not in issue. Nor do we think that the jury would be reasonably expected to be led to assume by it, that appellant was relying upon improper defenses. The giving of this instruction, if erroneous, was harmless error and not sufficient to cause a reversal of the judgment.

The first verdict rendered in this case assessed the damages at \$15,000 and was set aside by the trial court. The second verdict fixed the damages at \$17,000, and the trial court required a remittitur of \$2,000. On appeal to this court, it was held that such an excessive verdict was such evidence of passion and prejudice on the part of the jury that the remittitur required by the Circuit Court could not cure the error, and the judgment was reversed and the cause remanded for a new trial. The jury has now found the damages to be \$19,000 and the trial court has approved this action, and has also shown by requiring the remittitur in the previous trial that it considers this sum

not to be excessive. The trial court heard the evidence and has twice entered judgment for this amount, and we are not, under the circumstances, inclined to hold that the verdict is excessive.

The judgment will be affirmed.

H. Deane
May 26-1915

654

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GENERAL NO. 6252

OCTOBER TERM, A. D. 1914.

AGENDA NO. 50.

Filed April 16, 1915-

CHARLES F. BARTSON and WILLIAM MILLARD,
Appellants,

vs

J. V. WICKERT, et al.

Appellees.

)
) Appeal from Circuit
) Court Logan County.
)

193 I.A. 467

ELDRIDGE, P. J.

Appellants comprised a partnership doing business under the firm name of Bartson & Millard, and were engaged in the business of constructing drainage ditches. They filed a bill to foreclose a mechanic's lien on the lands owned or occupied by appellees, J. V. Wickert and H. A. Bailey, for labor done in cutting a drainage ditch thereon. The cause was referred to the Master in Chancery to take proofs only, and was heard by the Chancellor upon the proofs so taken before the Master, and a decree was entered dismissing the bill for want of equity, from which decree this appeal is prosecuted.

Prairie Creek meanders in a very irregular and winding course through sections 14, 18, 21, 22 and 23 in Prairie Creek Township in Logan County. A number of persons owning lands through which the creek runs, entered into a contract with appellants, dated April 5th 1910, ^{providing} the preamble of which is as follows:

"This contract was made and entered into this 5th day of April, A. D. 1910, by and between E. Angella Scully, Nanke Harms, Claus Harms, Richard Milgendorf, Mrs. O. M. Kiest, Mrs. M. M. Woods, Frank Guenther, Mrs. Albertine Knaak, John Wacker, J. V. Wickert, H. A. Bailey and Christian Weston, land owners, owning lands in the County of Logan, State of Illinois, Parties of the First Part, and Bartson and Millard, a co-partnership consisting of Charles F. Bartson and William Millard, of the City of Peoria, County

~~The contract provided~~
~~of Peoria, State of Illinois, Parties of the Second Part:~~

~~WITNESSETH:~~ That ~~whereas~~ the said Parties of the first part are the owners of lands through which the present channel of ~~Prairie Creek in Logan County, State of Illinois,~~ now runs, and are desirous of straightening the channel of the same, so as to prevent as far as possible their lands from overflow during high waters, and for the purpose of causing the water in said Prairie Creek to escape as rapidly as possible in its course."

~~The contract then proceeds to provide~~ that the parties of the first part, in consideration that the parties of the second part cut a drainage ditch of certain dimensions through certain lands, the route to be staked out by the engineers of the parties of the first part, agree to perform certain things. First: each land owner shall, at his or her expense, procure the right of way, and the execution of the contract by such land owner shall be considered as the consent of the owner to the cutting of the ditch through his or her land. Second: the parties of the first part to procure the consent and right of way of the commissioners of highways of the township to cut the ditch across the highways. Third: that each party of the first part shall each for him or herself, as to his or her property, keep such parties of the second part harmless from all liabilities for damages, etc. Fourth: that each land owner shall, at his or her expense, remove all trees, stumps and brush from the route of said ditch across his or her lands. Fifth: that said parties of the first part, at their own expense, shall cause the route of said ditch to be staked out by a competent engineer for the information and guidance of the parties of the second part on or before June 1st 1910. Seventh: the parties of the first part, each for him or herself, shall cause to be paid to the parties of the second part as fast as said ditch is completed, the sum of \$8.80 per lineal rod for each rod of ditch so constructed through his or her land except where, for the purpose

of straightening said creek, the channel of the creek shall be removed or come upon the land of an adjoining land owner, then the party to the agreement upon whose land the original creek now is shall pay the same for which he or she would have been liable had the new creek continued in his land for the same distance. Eighth: Each land owner agrees to pay the amount set opposite his or her name for the cutting of the ditch. (Among the names appearing in the list set out in the contract are the following: "John V. Wickert & J. H. Bailey, 81.2 rods, \$714.56."). The contract then provides that the parties of the second part shall commence work on the ditch on or before June 1st 1910, and complete the same on or before December 1st 1910; that the plat attached thereto made by the engineer shall be made a part of the contract; that the contract shall be declared null and void unless all the parties sign it.

was
The contract ~~is~~ executed under seal by all the land owners, except H. A. Bailey, and also by appellants and the highway commissioners. H. A. Bailey owns the east half of the southwest quarter of Section 21, and the east half of the northwest quarter of Section 28. These two eighties were divided by the section line. The 80 in Section 21 lies immediately north of the 80 in Section 28. Appellee Wickert was in possession of these two tracts of land under a written lease extending for five years from March 1st 1910, with the privilege of purchasing said land at any time during said period, ~~The lease contains the following provisions:~~

~~"Party of the second part agrees to keep the premises in as good repair as prevails at the beginning of this lease, and to build up the soil, and keep all buildings in condition as good as when accepted, and to improve all to the best of his ability."~~

~~This agreement is intended to give five years option on said real estate, to the said second party, to manage and direct as he deems best, but in accordance with the spirit of this lease."~~

When Wiekert signed the contract he made a star in front of his name and a similar star on the margin thereof, beside which he wrote "Signature binding only whenever ditch is cut on or along section line." The Court found by its decree that appellee Bailey had not signed the contract nor had he authorized Wiekert to sign it, and also that the ditch was not cut on or along the section line and for these reasons the contract was not binding as to Wiekert, and Bailey, and the bill was dismissed for want of equity.

No question ~~has been~~^{was} raised as to whether Section 1 of the Mechanic's Lien Law applies to an improvement of this kind upon farm lands, ~~and that question is eliminated in the consideration of this case.~~

On behalf of appellee Bailey, it is contended that he had not signed the contract and did not knowingly permit Wiekert to contract for the improvement. ~~Under Section 1 of the Mechanic's Lien Act an owner of land who knowingly consents to an improvement made thereon by his tenant subjects the land to a lien for the cost thereof. Boyer v Keller 258 Ill. 106; Haas Electric Co. v Amusement Co. 236 Ill. 452; Friebele v Schwartz 164 Ill. App. 504. In the last case it was held:~~

~~"Under the present Statute an owner, knowing an improvement is being made, must object to the improvement, otherwise he knowingly permits the improvement and thereby consents to the party being entitled to a lien."~~

The rule that an appellate tribunal will not ordinarily disturb a finding of fact by the chancellor does not apply where the master made no findings of fact and the chancellor did not see or hear the witnesses, but rendered his decision simply upon the depositions of witnesses taken before the master. Under such conditions, where the error assigned is, that a finding of fact is contrary to the manifest weight of the evidence, this Court must review the evidence and determine that question from the record in

~~the same manner that it was passed upon by the chancellor.~~

7 The evidence shows that when the subject of cutting the ditch was being discussed by the land owners they had several meetings in regard thereto, and the witness Charles B. Wood testifies that he called up Bailey on the telephone and asked him what he would do in regard to the matter and he replied, "The farm is out of my hands; any arrangements will have to be made with Mr. Wiekert." Bailey does not deny this conversation with Wood, but says that he does not remember it. Appellant Millard testifies that after the ditch was completed he called on Bailey and asked him to give him a check for the money. This Bailey refused to do and told him that Wiekert was in control of the land. William McCormick, a banker at Emden, testifies that he talked with Bailey several times about cutting the ditch and Bailey made no objection to it. Bailey admits that he talked with Wiekert about the matter and tried to discourage him from joining in the project, but he does not testify that he ever forbid him to do so. ~~Bailey's testimony and that of the other witnesses, clearly show that Bailey considered that Wiekert had the management of the farm, that he expected Wiekert to purchase it under the option in the lease and that the cutting of the ditch was a proposition for Wiekert to determine for himself. His direction to the other parties that the farm was out of his hands and that the arrangement would have to be made with Wiekert was a clear intimation that so far as his interests in the land were concerned they were controlled by Wiekert, and if the claim against Wiekert can be sustained, appellee is estopped to deny that he knowingly permitted the improvement.~~

On behalf of appellee Wiekert it is contended that under the condition added to the contract, that the ditch should be cut on or along the section line, he is not liable upon the contract because the ditch was not cut in conformity thereto. Prairie Creek enters the said north eighty at the southeast corner thereof and meanders in a crooked and circuitous route in a northwesterly ,



direction across the west line thereof at about 180 feet north of the section line. The object, as stated in the contract, was to straighten out the course of the creek. One of the land owners, Manke Harms, testified that when he went to see Wiekert about signing the contract, Wiekert said he was in favor of cutting the ditch provided it went on the section line, and that he told Wiekert it could not be cut clear through on the section line, to which Wiekert replied in substance, "No, they could not go clear through, they had to make a turn in his field,"; that Wiekert marked on the map the place to which the ditch could go on the section line and where it would have to turn into the field and go northwesterly across the land, and that the place marked by Wiekert is about the place where the turn was actually made.

The ditch followed the section line bounding the north 80 on the line about half way across the 80, then turned northwesterly and cut the west line of the 80 about 180 feet north of the section line. This was done in order to make a connection with the creek where it crossed the west line of the 80 and entered the land of Christian Westen, and to avoid cutting through a sand hill on Westen's land. L. J. Simms, one of the surveyors, testified that Wiekert pointed out to him practically the place where the ditch is now made and the point where it should leave the section line. Robert Hartnell, the County Surveyor, whom the land owners employed to finally locate the line, testified that he told Wiekert that it would be impossible to carry the ditch on the line all the way across his land as they had to make a curve to avoid the sand hill on the adjoining land, and that Wiekert replied, "well, keep on the section line as far as possible." The creek in its original location separated about 6-1/2 acres between it and the section line, from the rest of the 80. The ditch as constructed reduced this to about an acre and a half. ~~A substantial compliance with the contract was all that was required and the words "on or along the section line" used disjunctively do not necessarily mean directly thereon, but may mean near or in the vicinity thereof.~~ Stahr v



Carter 116 Iowa 380; Commonwealth v Franklin 133 Mass. 569. Their meaning must be determined from the whole contract, and as the primary object thereof was to procure a straightening of the creek, they must be construed to mean as near the section line as a practical construction of the ditch for that purpose would allow. Wiekert denies that he ever consented to have the ditch cut at any other place than along the section line. The route of the ditch as originally contemplated by the plat attached to the contract started in a northwesterly direction from the southeast corner of the north 80. Its route was changed at Wiekert's request and was cut directly on the section line for approximately 700 feet when the divergence was made to a northwesterly direction as above stated. Hartnell, the County Surveyor, who testified that he staked out the ditch substantially in accordance with Wiekert's directions, was as much the agent of Wiekert under the terms of the contract as of any of the other land owners. He was not appellant's agent. Appellant simply cut the ditch along the route staked out by the county surveyor, who was employed by the land owners, including Wiekert.

We think the manifest weight of the evidence shows that the ditch was cut by appellants substantially in accordance with the terms of the contract as amended by Wiekert and with Wiekert's understanding and consent thereto.

The decree must therefore be reversed with directions to enter a decree in conformity with the opinion herein expressed.



635

Gen. No. 6264.

October Term, 1914.

Agenda No. 53-

Filed April 16, 1915-

Harry D. Cowden,
Plaintiff in Error.

VS. ; Error to Circuit Court of

Joseph Stout,
Defendant in Error.

McLean County.

193 I.A. 470

ELDREDGE, P.J.- *action by against*

as
~~Plaintiff in error sued defendant in error to recover~~
\$350. ~~for commissions for his alleged services in procuring a loan~~
~~for defendant in error in the sum of \$35,000. The case was tried~~
~~before the court without a jury, who found the issues joined in~~
~~favor of the defendant and in error and entered judgment accord-~~
~~ingly. Substantially the whole argument of plaintiff in error is~~
~~a discussion of the facts in support of the assignment of error that~~
~~the finding is contrary to the evidence. There is ample evidence~~
~~in the record to sustain the finding of the court and the finding~~
~~is not contrary to the manifest weight thereof. Counsel say in~~
~~their argument: "We also believe the trial court erroneously~~
~~refused to hold with plaintiff the propositions of law submitted~~
~~in his behalf, and that the record discloses highly technical rul-~~
~~ings upon the admission and exclusion of evidence which resulted in~~
~~injury to plaintiff". The particular rulings of the court upon~~
~~the propositions of law and upon the admission and exclusion of~~
~~evidence are not pointed out in the argument and we have no means~~
~~of knowing what rulings of the court thereon, respectively, are~~
~~complained of or the reasons therefor.~~
~~However, we have examined the propositions of law submitted as~~
~~disclosed by the abstract and are of the opinion that the court~~
~~did not err in its rulings thereon.~~

No other errors are presented in the argument of
counsel and the judgment must be affirmed.

658

Admitted
May 26 1915

OFFICIAL NO. 4274.

OCTOBER TERM, A. D. 1914.

ATTORNEY GENERAL.

Filed April 16, 1915

JOHN W. WOLF,
Appellant,

vs.

Appeal from Circuit

H. A. MAYTON, ADMINISTRATOR

Court of Multnomah County.

of the

ESTATE OF GEORGE F. WILSON, DECEASED,
Appellee.

193 I.A. 482

WILSON, F. J.

Appellant, John W. Wolf, filed a claim in the County Court of Multnomah County against the estate of George F. Wilson, deceased, based upon two promissory notes purporting to have been executed by Wilson in his life time, and for the principal sum of \$114, and the other for \$750. Each note is dated May 1st 1912, and bears 6% interest. They are payable in eight and twelve months after date, respectively. The claim, including the principal and accumulated interest, at the date of the filing thereof amounted to \$1045.00.

The administrator and each of the heirs filed objections to the claim on the ground that the notes were not the notes of the deceased, and two of the heirs filed affidavits

stating that the signatures to said notes were not the signatures of the deceased. The notes purport to be signed by George W. Dishman by his mark, and ^{were} ~~was~~ witnessed by one Charles Lucas. Dishman died January 16, 1913, and letters of administration were issued January 18th, 1913. The claim was not filed until November 3, 1913.) It was disallowed in the County Court and on appeal to the Circuit Court, on a trial before a jury, a verdict was rendered in favor of appellee, on which verdict judgment was entered disallowing the claim.

Appellant proved a prima facie case by the evidence of Lucas, ~~who~~ testified that he was present when the notes were signed by Dishman with his marks, and that he, Lucas, signed his own name on the notes as a witness to the marks. Lucas himself ~~could~~ ^{not} read and all he ~~could~~ ^{was} write ~~is~~ his signature. There is a total absence of evidence of any consideration for these notes except that Lucas testified that they were given as renewals of two prior existing notes,) and from the character of the testimony of this witness, if there had been no prejudicial errors on the trial, we would not be inclined to disturb the judgment, but appellant has a right to have the validity of his

claim determined from competent evidence and under proper instructions.

Rosa Meek, one of the heirs and witness for appellee, over objection of appellant, was permitted to testify that she was familiar with her father's business, and that he trusted his debts, receipts and all such papers to her until about a year before his death; that she was familiar with his business in general and had talked with him about the amount of his debts and property; that she was in the office of his attorney with her father in November prior to his death, and at that time learned what his debts were and what he owed; that the first time she saw these notes was within two or three months before the trial and that she never heard of them before that time; that she never knew of his borrowing an amount of money that was anywhere equal to the aggregate sum of these notes.

Charles Dishman, an heir and witness for appellee, was permitted, over objection, to testify that he knew his father's business and never heard of these notes until about three months before the trial. He was then asked this question: "Did your father borrow any money of Mr. Wolf?" And answered: "Not that I know of."

The administrator testified, over objection, that he had been attorney for Dishman for three^{or four} years before his death and never learned of the existence of the notes until shortly before they were filed as a claim in the County Court.

All the above testimony was incompetent and highly prejudicial. If claims for debts left by a decedent could be defeated upon the evidence of his heirs and attorney that they had not heard of them, then few, if any, could ever be proven or collected.

The sixth instruction given on behalf of appellee is as follows:

"The Court instructs the jury that it is your duty to consider all the circumstances proven by the defendant in his case, as well as all circumstances proven by the plaintiff. And if you believe from the evidence and circumstances proven in the case that the notes here sued on were not in existence during the lifetime of George W. Dishman, then you should find for the defendant."

This instruction apparently makes a distinction between the evidence and circumstances proven and tells the jury to particularly consider the circumstances proven in the case. The

vice of this instruction will become more apparent when it is read in connection with the seventh and eighth instructions following, and especially in view of the fact that there was so much erroneous proof of circumstances. The instruction is also bad because there was no evidence in the record that the notes were not in existence during the lifetime of the deceased. The seventh instruction is as follows:

"The Court instructs you upon the question of the preponderance of the evidence as follows: 'The term 'preponderance' means 'greater weight' of the evidence. You have the right to take and consider all the circumstances proven in the case, and if you believe from the circumstances proven in the case that George W. Dishman did not sign the notes here in question, then you have a right to find that the preponderance of the evidence is with the defendant, although the preponderance of the evidence is made up of circumstances proven, instead of direct and positive testimony.'"

It is the duty of the jury to consider all the evidence, whether it is circumstantial or otherwise, but by this instruction the jury is told that it had a right to consider the circumstances alone, and that if it believed from the circumstances proven, that the notes were not signed by deceased, it had a

right to find that the preponderance of the evidence was with the defendant.

The eighth instruction also makes a distinction between the evidence and the circumstances proven and reads as follows:

"The Court instructs the jury, that if you believe from the evidence and circumstances proven in the case, that any witness who has appeared here and testified has knowingly, willingly and corruptly testified knowingly false on any material matter in this case, then it would be your duty to disregard his entire testimony, except in so far as the evidence is corroborated by other creditable evidence in the case."

These instructions give an importance and emphasis to circumstantial evidence which is not warranted under the law and were particularly harmful because of the erroneous admission of so much incompetent proof.

The ninth instruction instructs the jury:

"that if you believe from the evidence, that Charles Lucas, a witness for the claimant, testified upon the former trial in this cause, in the County Court, that the notes were signed on the 1st day of May, A. D. 1912, you have a right to consider this evidence in connection with all the other evidence in the case."

This instruction calls the attention of the jury to a particular witness by name and to a particular part of his testimony, and read in connection with the preceding instruction, carries with it an implication that if he gave the testimony mentioned on the former trial, it would be the duty of the jury to disregard his entire testimony, except in so far as it might be corroborated by other evidence. It is error to single out a particular witness by name, who is not a party to the suit, and apply the law of impeachment to him alone; such instructions should be general and apply to all the witnesses. It is also error to point out and call the attention of the jury to particular facts in the case.

There was also error in the admission of the testimony of the witness Williamson called in rebuttal on behalf of appellant, and, while no cross error has been assigned to the admission of this testimony, yet, as this case must be remanded for another trial, in order that the error may not be repeated, we call attention to it at this time. The testimony consisted of self serving declarations on behalf of appellant and the whole testimony of this witness was incompetent.

The judgment will be reversed and the cause remanded.

660

Filed April 16-1915

M. E. SCARLETT and GEORGE THOMAS, :
Appellees, :
vs :
NATIONAL LIVE STOCK INSURANCE COMPANY, :
Appellant. :

Appeal from the Circuit
Court of Vermilion County.

193 I.A. 488

BRIDGE, P. J.

This is an action of assumpsit brought by appellees against appellant for the sum of \$1,000 based upon a policy of insurance to indemnify appellees for loss by death from accident, disease, and theft, fire, of a certain stallion named "Royal Reliance". Appellees recovered judgment in the trial court for the above sum, ~~therefrom~~ which this appeal is presented.

The barn in which the stallion was kept was destroyed by a fire in which the stallion lost his life. The application for the policy was procured from appellees by appellant's agent Zoa, and several of the defenses interposed were that appellees made certain false statements in the application which were warranties, in consequence of which the policy was void. The evidence for appellees tends to show that they truthfully answered all the questions in the application, and that the false answers therein were inserted by the agent without their knowledge.) It is conclusively settled as a rule of law in this state, established by a long line of decisions, that if an application for insurance gives true answers to the questions contained in the application, but the agent of the insurance company inserts false answers in lieu thereof, that parol evidence is admissible to prove such facts notwithstanding stipulations contained in the application that the agent shall be deemed the agent of the assured, and also, that notice to the agent, at the time of the application for insurance, of facts material to the risk, is notice to the insurance company, and that the latter is estopped to insist such answers are warranties. *Royal Neighbors of America v Bonan* 177 Ill. 27; *Provident Life Society v Cannon* 201 Ill. 230; *Johnson v Royal Neighbors*

53 Ill. 570. Whether appellees truthfully or falsely answered the questions propounded in the application and whether the agent inserted true or false answers therein, were questions of fact for the jury to determine. The testimony of appellees seems to be corroborated by two important facts appearing from the evidence; first, (See, appellant's agent, testified on the trial and did not deny the testimony of appellees that they gave true and correct answers to the questions in the application; and second, appellees, in making out the proofs of loss, fully disclosed therein all the matters truthfully, just as they testified they told the agent in the first instance when the application was made.) It would hardly seem reasonable that they would answer said questions falsely when the application was being made for the purpose of procuring the policy, and then answer the same questions truthfully after the loss had occurred and when they were seeking payment therefor, the effect of which would be virtually to convict themselves of fraud in procuring the policy. Undoubtedly these facts had weight with the jury in deciding the case.

The policy provides that the Company shall not be liable if the assured, in case of sickness or accident to the animal insured, shall fail to render forthwith by registered mail or telegram, notice to the company at its home office of such sickness or accident, together with the name and address of the veterinarian employed. It appears from the evidence that some time before the stallion was burned, he received a kick from a horse resulting in a slight scratch on the fleshy part of the hip which bled a little but did not penetrate through the skin, created no soreness, did not affect the animal in any way, was considered so slight that no attention was paid to it and appellant was not notified thereof under the above provisions of the policy. It is insisted that there was a violation of this provision and thereby a recovery is barred.) The scratch had nothing whatever to do with the loss of the animal, and in our opinion was too trivial in character to be classified as an illness or accident within the meaning of said provision.

The Court at the instance of appellees gave to the jury the following instruction:

"The court instructs the jury that although the policy in question contains a stipulation that in case of accident or sickness to the animal in question, the Company will not be liable, if the assured shall fail to render forthwith, by registered mail or telegraph, notice to the Company of such accident or sickness together with the name and address of the veterinarian employed, yet you are further instructed that it is your duty to construe this provision of the policy as well as other provisions of the policy in a reasonable manner in the light of the evidence and your knowledge and experience as men of affairs."

This instruction is clearly erroneous. The construction of the terms of a contract is a matter of law for the Court and not for the jury. It was the duty of the Court to inform the jury as to how the law construed the different provisions of the policy and application in controversy, and it was the duty of the jury to determine the facts from the evidence and apply the law thereto. This instruction virtually made the jury the judge of both the law and facts. No attempt is made by appellees to justify the giving of this instruction and there could be no justification for it. Under this instruction the jury was at liberty to find any verdict they saw fit regardless of all rules of law governing the rights of the parties under their contract.

For the error indicated the judgment must therefore be reversed and cause remanded.

Gen. No. 6289.

October Term, 1914-

Agenda No. 10

Filed April 16, 1915-

Jennie Parker,
Appellee.,

vs.

American Assurance Company,
a corporation.,
Appellant.

Appeal from Circuit Court of
Vermilion County.

193 I.A. 491

ELDRIDGE, P.J.

~~_____~~ Action of assumpsit brought by appellee against appellant to recover as the beneficiary under a policy of insurance on the life of her husband, who died September 3, 1913. The case was tried before the court without a jury and a judgment rendered against appellant for the sum of \$100. No propositions of law or fact were submitted to the court and no question is discussed in the argument but that of whether the payment of the last premium was made in apt time under the facts shown in evidence and the terms of the policy. Appellant has not seen fit to abstract the policy and we have no means of knowing what its provisions are without going to the record, which we are not obliged to do. There is nothing presented to us to be determined and it will be presumed that the court did not err in rendering the judgment.

The judgment will be affirmed.

Mr. Justice Scholfield took no part in the consideration of this case.

Gen. No. 6290

October Term, 1914.

Ag. No. 59.

Sarah T. Burge,

Appellee.

vs

: Appeal from Circuit Court of

St. Louis, Springfield and Macoupin County.

Peoria Railroad.

Appellant.

Eldredge, P.J.

Filed April 16, 1915.

Filed April 16, 1915.

193 I.A. 492

Appellee recovered a judgment against the appell-

ant for the sum of \$700. in an action ^{for} on the case to recover

damages for personal injuries received through alleged negligence

of appellant while she was alighting from one of its cars. *The*

defendant appealed.

1913

The declaration ~~averts that on June 1st the appell-~~

~~and was operating a line of railroad for the transportation of~~

~~passengers under the management of its servants who were then~~

~~driving the car from the village of Benld to the city of Gilles-~~

~~pie in Macoupin County: the plaintiff ^{was} ~~became~~ a passenger at~~ *on an electric*

car to which
~~Benld, to be carried to South Gillespie Crossing in the city~~

~~of Gillespie and that it was the duty of the defendant to exer-~~

~~cise due and proper care to stop said car at said South Gilles-~~

~~pie Crossing and there to assist her in alighting from said car~~

~~so that she in the exercise of due care for her own safety could~~

~~alight from said car upon said crossing without injury; that~~

The Plaintiff claimed that the

~~appellant so negligently managed and controlled said car that it~~

the same was not stopped at ~~said~~ South Gillespie crossing so
that ~~said~~ ^{the} appellee could alight upon ^{the} ~~said~~ crossing, but that
~~said~~ ^{the} car was negligently and carelessly stopped so that the steps
thereof were about 6 feet north of the north line of ~~said~~ ^{the} cross-
ing, ~~and over and greatly above the uneven, rough and slanting~~
~~ground there; and that~~ ^{the} ~~said~~ agents and servants ^{of the defendant} negligently
failed to exercise due and proper care in assisting plaintiff
to alight from ~~said~~ car; that by reason of the darkness, she
could not by the exercise of ordinary care for her own safety,
observe and know that the steps of the car were not over and
above the crossing, and that while she in the exercise of due
care, and having good reason to believe and believing that ~~said~~
steps were above ~~said~~ ^{the} crossing, she was by reason of the great
distance and the uneven and slanting condition of the ground
there caused to fall, by which ~~she was injured, etc.~~

~~It is only necessary to pass upon one of the errors pre-~~
~~sented in the argument and that is, the assignment that the ver-~~
^{is alleged to be} dict is contrary to the law and the evidence. The evidence shows
that appellee resided in the third house north ^{from} the crossing
in question, ^{which} ~~The crossing itself~~ was constructed of brick and
was about three feet wide. The street where the appellee alight-
ed was the ordinary unpaved street of a country town, and while
probably
it ~~was~~ somewhat lower than the crossing itself, no dangerous con-
ditions were shown to exist therein. ~~Appellee living so close~~
~~to the crossing was perfectly familiar with it and the condition~~

~~of the street. Appellant is an interurban electric railroad com-~~
~~pany, and on June 1st, 1913, appellee, with her friend, Mrs.~~
~~Myrtle Robinson, had gone on the interurban railway to the vil-~~
~~lage of Benld and were returning to Gillespie the same evening~~
~~when the accident happened. Two cars composed the train. Appellee~~
~~was riding in the rear car, which was a trailer, the front car~~
~~being the motor car. She requested the conductor to stop the~~
~~car at the South Gillespie crossing. When the cars came to a~~
~~stop appellee and her friend proceeded to get off, Mrs. Rob-~~
~~inson left the car first and did so safely. Appellee followed,~~
~~and relates the circumstances as follows:-~~

and as she
~~"I stepped off just as you would step off the car~~
~~and I missed my step and my foot turned in under me and my an-~~
~~kle was dislocated, sprained. I missed my step and fell: I~~
~~was trying to step on to the ground and when I stepped I stepped~~
~~and thought I was stepping on the ground but didn't."~~

The law imposes no duty on street car companies oper-
ating ~~operating~~ cars on the streets ^{in cities} and villages to stop so the
steps will be directly over the crossings. In fact, it is a
matter of common knowledge that many municipalities for the
purpose of promoting public safety have passed ordinances pro-
hibiting such cars from stopping on the crossings on the streets
and providing that they shall be stopped either on the near or
far sides thereof. That the street was not on a level with

the crossing was not the fault of the appellant. Neither is there any duty imposed by law upon servants operating such cars under ordinary circumstances to assist the passengers in alighting therefrom. There might be cases where under particular circumstances the law would impose a duty on the carrier through its servants to assist a passenger in alighting from a car, but no such circumstances or conditions which would impose such a duty upon the appellant in this case appear from the evidence. It is also doubtful in this case from the testimony of the appellee herself noted above, whether the location of the car when it stopped was the proximate cause of her injury.

The judgment must be reversed with the finding of fact to be incorporated in the judgment that the injury received by appellee was not caused by the negligence of the appellant.

664

Gen. No. 6298. Oct. Term, 1914- Ag. No. 26-

J.A. Matheny, Appellee., Filed April 16, 1915-

VS. ; Appeal from the City Court of

E.L. Lees, Appellant. P A N A .

193 I.A. 503

ELDRIDGE, P.J.

Action of
~~This is a suit in assumpsit, in which appellee recovered a judgment against appellant for \$246.37. The cause of action is based upon the following memorandum in writing.~~
written

"Pana, Ill., 4- 9- '11.

This is to certify that J.A.Matheny has half interest in the note and mortgage on Tower Hill meat market, less expenses, amount about \$600.00.

(Signed) E.L. Lees".

Such instrument
The above ~~was~~ given to appellee by appellant at the conclusion of a real estate deal in which both had an interest. The note and mortgage represented the commissions of appellee and appellant for negotiating the sale of certain real estate.

~~The note and mortgage had been taken in the name of appellant.~~
The evidence shows that appellee and appellant had been partners in the insurance business for about a year and that in addition to said ~~insurance business for about a year~~ *that* they negotiated several real estate deals, and it ~~is~~ *was* the contention of appellee that the real estate deals constituted no part of the partnership business, but ~~were~~ were carried on as independent transactions and that at the conclusion of each a settlement was made for the work each had done in reference to the same, and that ~~only one of said deals~~ *that* remained ~~undisposed of at the time of the suit in question~~ *was* and that ~~was the one~~ *that* here involved. Appellant contends that these real estate deals were partnership affairs and the only defense inter-

ed in this case was that this particular real estate transaction was a part of the partnership business, and that one partner cannot sue another ~~not~~ at law until there has been a dissolution of the partnership, final settlement of the firm, a balance struck and a promise to pay. Whether this transaction was consummated as a partnership affair was a question of law and fact. The evidence in regard thereto is in irreconcilable conflict and the jury having found the issue on this proposition in favor of appellee it is conclusive in regard to that question in this court.

~~Appellant submitted the following special interrogatory to be answered by the jury:~~

“Did the plaintiff and the defendant, during the time they were associated together deal in real estate generally for their mutual profit, sharing the profits, losses and expenses incident to said business?”

~~The court refused to submit the interrogatory to the jury, and in this there was no error as it did not relate to an ultimate fact.~~

~~There is no reversible error in the admission of evidence not in the instructions of the court.~~

~~The judgment must be affirmed.~~

~~A F F I R M E D .~~

The court refused to submit to the jury the following special interrogatory requested by the appellant.

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

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CHICAGO, ILL. 60637

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637

665
General No. 6300.

Oct. Term, 1914-

Ag. No. 27-

Filed April 16, 1915-

Phoebe Mye.,

Appellant.,

VS.

;

Appeal from the Circuit Court of
Vermilion County.

E. E. Clark.,

Appellee.

193 I.A. 505

Mildredge, P.J.

Appellant brought her action on the case *brought by*
against appellee for malpractice in the treatment of her eye.

~~By the verdict of the jury~~ *(the defendant was found not guilty)*
and appellant appeals from the judgment rendered on the verdict *finding*

Appellant when twenty-three years of age lost
her left eye in ~~some way not disclosed by the evidence.~~ *of which* The whole
eye at that time was removed from the socket. Four years later a
surgeon at Cincinnati, *unsuccessfully* performed an operation including a grafting
of skin in and about her eye lids, for the purpose of enabling
her to use an artificial eye. This operation was unsuccessful.
Twenty-four years later she went to appellee, who was a specialist
in the diseases of the eye, ear, nose and throat, for the purpose
of having him treat one ~~of her~~ *when* her ears, ~~while he was treating~~
~~her ear the subject of the condition of her eye and the possibil-~~
ity of the use by her of an artificial eye through another opera-
tion was frequently discussed between them, *and* which resulted in appel-
lee performing the operation on her eye over which this contro-
versy arose. ~~The testimony of appellant and appellee somewhat con-~~
~~flict as to the substance of these conversations.~~ Appellant
testifies that appellee assured her he could perform the opera-
tion successfully, while appellee testifies that he told her there
was a fair chance of a successful operation, but rather discouraged
her in attempting to have it done on account of her age at that
time, ~~and states in his testimony that she told him her husband~~
~~had died about a year previous, that she did not have very much~~

~~financial means, was a public medium, decided to go to California to practice that calling and that she would be more successful if her looks could be improved by an artificial eye. Appellee, performed the operation in the hospital at Danville, and in the operation grafted some skin taken from the arm of appellant on to the eyelids. The operation, so far as the grafting was concerned, appears to have been successful, but it did not accomplish the purpose for which it was done, that is, the eye lids still shrank to such an extent that an artificial eye could not be used, and appellant claims that as a result of the operation the eye lashes on the upper lid were destroyed making more disfigurement than when she was before the operation. Appellee then went to Chicago and had another operation performed by a specialist in that city, which was also unsuccessful. Afterwards she went to Joliet and had still another operation performed, which was likewise unsuccessful. She then brought this suit against appellee.~~

Appellant introduced no evidence, except ~~the testimony of~~ ^{her own,} herself, as to the skillfulness or unskillfulness of the treatments and operation performed by appellee. While the evidence for appellee, shown by a number of experts, tended to prove that the operations were skillfully performed and in accordance with the modern scientific knowledge of such operations. It is a matter of great doubt from the evidence whether the disfigurements now complained of were caused by the operation performed by appellee or the subsequent operations performed by the other specialists. The burden of proving that the operations performed by appellee were negligently and unskillfully done was upon appellant, and under the facts we do not see how the jury could have done otherwise than find the verdict which it did.

~~It is contended that the court erred in permitting certain hypothetical questions, propounded to the expert witnesses produced by appellee, to be answered. The objection to these questions were wholly general and the rule in regard to hypothetical questions propounded to experts is that they should be specific.~~

Such questions are generally necessarily very lengthy and involve many facts, and ordinarily the trial judge has no means of knowing where the question might be oraneous, or on what specific ground objection is made and on which he is required to rule, unless the objections the etc are pointed out. Catlin v. Traders Ins. Co. 83 Ill. App. 40; City of Alton v. Honeyman 108 Ill., App. 536; Riverton Coal Co., v. Shepherd 111 Ill. App. 294; Botwinis v. Allgood, 113 Ill. App. 188.

the jury was instructed
~~It is also urged that the court erred in giving instructions numbered 2, 3, 5, 7 and 8 on behalf of the plaintiff on the ground that by said instructions appellee was held liable only to the exercise of ordinary skill and care such as physicians in good practice ordinarily use, while the true rule is, that the law imposes upon one who holds himself out to the public as a specialist a duty to exercise a higher degree of skill and care than is required of the ordinary practitioner. This criticism might be well taken if, *and she* appellant *also* herself had not requested and caused the Court to give instructions announcing the same rule as that stated in those given for appellee. We are of opinion that there was no reversible error in the case.~~

~~The judgment will therefore be affirmed.~~

.....

Mr. Justice Scholfield took no part in the consideration of this case .

666

GENERAL NO. 6302.

OCTOBER TERM, A. D. 1914.

AGENDA NO. 29.

Filed April 16, 1915.

RUTH BAKER,

Appellee,

VS

MODE MILLINERY COMPANY,

Appellant.

Appeal from the Circuit
Court of McLean County.

193 I.A. 507

ELDRIDGE, P. J.

Appellee recovered a judgment for damages in the sum of \$500 in an action of assumpsit against appellant company for breach of contract of employment, ^{from} ~~for wages, to reverse which appellant prosecutes this appeal.~~

Appellant owned a number of millinery stores in different cities and desired to open a branch store in Bloomington, Illinois. Mr. Fred Fehr was the president and general manager of appellant company.

Appellee ^{who} was an experienced manager of ^{millinery} such stores, and was employed by appellant as manager of its store in Bloomington, ^{made a} ~~the original contract of hiring~~ ^{for one year} ~~was made on the 15th day of January, 1913, and the employment was to commence on the 10th day of February, 1913, and to terminate on the 10th day of February, 1914.~~ ¹⁵ Appellee, ¹⁰ ~~according to her testimony,~~ ^{claiming} was to receive \$25 per week, ^{she} ~~as such manager,~~ ^{continued} while the evidence for appellant company was, that her employment was for fourteen weeks beginning the 10th day of February, 1913, provided she "made good". The evidence for appellee ^{worked} ~~tended to show that after appellee had been employed about three weeks,~~ ^{she was} ~~Mr. Fehr told her that,~~ ^{as} the business was not paying she must discharge one of the young lady clerks, ^{which she refused to do} and that she told him ^{as} that she had employed the ^{clerk} ~~girl~~ ^{and} for the season, which would end in July, and rather than break her agreement with the girl, who was only receiving \$10 a week, she would pay \$5 per week ^{to which she assented} ~~to the girl~~ out of her own salary; that Fehr agreed to this and appellee thereafter received ^{she was told that} \$20 a week until about the 12th of July, when Mr. Fehr again said the expenses were too high and that during the dull season, which lasts from the 1st of July until about the 15th of August, her salary would have to be cut from \$20 to \$10 a week; that she told him she could not live on \$10 a week, and ^{appellant agreed} ~~he then said~~ he would make it \$15 a week until the

busy season started about August 15th, and when he would make it \$25 a week until February 10, 1914; that appellee worked on at \$15 a week until about August 12th when she received a letter from Mr. Fehr to the effect that she was discharged and that a new manager had been employed who would take charge August 15th; that the fall season had then begun and it would be quite difficult for appellee to procure any other position at that time; that she wrote to Mr. Fehr, in reply to his letter, stating that it was too late in the season for her to secure another position as manager of such an establishment and that she intended to hold the company to its contract with her; that the new manager came to the store August 15th to take charge thereof and appellee refused to permit her to do so; that Fehr then came to Bloomington and summarily discharged appellee, who left under protest; that she immediately tried to secure a similar position with several merchants in Bloomington, which she was unable to do at that season of the year, and then went to Chicago where she also failed to secure employment and finally returned to Bloomington and accepted a position as a clerk in the millinery department of another store at a salary of \$15 a week for ten weeks; that the \$150 thus received for the ten weeks was all that she was able to earn from the time she was discharged to February 10, 1914; that in seeking this employment she was put to an expense of \$25.

The original declaration consisted of the common counts, with which was filed an affidavit of amount due in which was stated that the amount sued for was for wages and damages due her from appellant from August 15th 1913, to February 10th 1914. During the trial appellant made a motion to exclude all the testimony introduced by appellee concerning the original contract made on the 15th day of January, 1913, on the ground that it was void under the Statute of Frauds, which motion the Court sustained. By leave of court appellee filed an additional special count, which was based upon the agreement made by appellee and Fehr on July 12th by which appellee was to receive \$15 per week from that time until August 15th when she was to receive \$25 a week until February 10th, 1914. Thereupon appellant made a motion for a continuance on the ground of a surprise, ^{when} ~~which~~ the Court overruled,

~~and the ruling of the Court in this regard is assigned as error. No new cause of action was stated in the special count and the affidavit of amount due filed with the original declaration, which consisted of the common counts, fully apprised appellant of the fact that appellee was seeking to recover for the amount due her from August 15th 1913, to February 12th 1914. It is contended by appellant that there was but one contract and that the original one, made January 15th 1913, which coming within the Statute of Frauds was void, therefore there can be no recovery. While the original contract was undoubtedly void for the reason suggested, yet the evidence tends to show that it was abandoned and a new contract was made on July 12th 1913, and appellee had a right to recover under the new contract for wages due. Whether such a contract was made and whether appellee was wrongfully discharged were questions of fact which have been settled by the verdict of the jury.~~

~~It is also claimed that the court erred in admitting evidence of the expense appellee incurred in seeking other employment. It was the duty of appellee to make an honest effort to secure other employment in order to mitigate the damages and she had a right to seek the same employment. Williams v Chicago Coal Co., 66 Ill. 140. This she unquestionably did. For a long time her business had been that of managing millinery departments in stores and she had a right and it was her duty to try to procure a similar employment at similar wages. She was unsuccessful in her efforts to secure such employment in Bloomington and went to Chicago for that purpose, where she was also unsuccessful. The evidence shows that in making these attempts she was put to an expense of about \$25. To see no reason why as an element of damage in an action to recover on a breach of contract of employment by an employee for her wrongful discharge, the reasonable expenses she might be put to in seeking other employment should not be proper.~~

~~There was no harmful error in the giving or refusing of the instructions.~~

~~The judgment will be affirmed.~~

W. L. WRIGHT and W. E. FRY,
Appellants,
vs
T. H. LANE,
Appellee.

Filed April 16-1915-
Appeal from Circuit Court
of Montgomery County.

193 I.A. 510

ELDRIDGE, P. J.

~~This is an appeal from the judgment of the trial court in~~
~~favor of appellee in an action of assumpsit brought by appellants~~
~~to recover damages for an alleged breach of a contract,~~
~~entered into~~
~~by appellee and appellants August 5th 1907.~~
against
Judgment was
entered in favor of appellant
appeal

The case was tried before the court without a jury. No propo-
sitions of law or fact were asked, and the whole argument of appellants
claim
is confined to the single error that the Court should have found
differently on the facts.

~~The contract is a lengthy one and in substance is as follows:~~
Contracted August 5, 1907
That appellants for the consideration thereafter set forth agreed
to undertake the sale of 200 lots to be laid out and platted from a
tract of land owned by appellee; *and* that appellants as a guaranty of good
faith agreed to pay appellee \$1,000 within 30 days of the acceptance
of the contract, and when so paid to be considered an advance payment
on the purchase price of *the* land; *the* appellants *also* agreed to
pay the interest on a note for the principal sum of \$3,500 secured by
mortgage on the land, ~~previously executed by appellee, and then a lien~~
~~thereon, until the note was paid; that the land was to be platted into~~
~~lots of regulation size, as might be deemed advisable by appellants,~~
~~whereby as many lots as possible may be secured; that said lots should~~
~~be sold at an average price of \$100 each upon the terms of a payment~~
~~of \$1 cash and \$1 per week thereafter until the full purchase price~~
~~had been received; and on this basis the terms of settlement for the~~
~~balance of the purchase price to appellee and the advancement made to~~
~~appellants together with \$150 per month to be received by appellants~~
~~for their services, was to be made, and if a greater or less amount~~
~~be sold the payment should be proportioned accordingly; appellee was~~

to receive from the first payments less the \$150 paid to appellants an amount sufficient to pay the said note of \$3,500 together with the expenses incurred in making sale of the lots, preparing the ground, advertising and paying the taxes on the land; afterwards appellants were to continue to receive \$150 per month out of the balance of the payments and appellee was to receive \$5,500, which was to be considered as part of the purchase price; appellants were then to receive the remaining 10/65 of the payments until they had been repaid the \$1,000 advanced by them; then the ensuing payments to be used for the purpose of purchasing whatever rights the Olympic Park Association might have in the land; and thereafter the remaining payments on the lots to be disbursed one-third to appellee and two-thirds to appellants until appellee had received \$10,000, when he was to execute a warranty deed to an undivided two-thirds interest in whatsoever might remain in such lots or land; that the title should remain in appellee until the above conditions were complied with; that appellee should at his own expense collect the payments as they became due and execute deeds to the purchasers of the lots when paid for; that appellee should enlist the services of some competent person or persons to off set the work done by appellants in the sale of the lots; that the crops on the land should become the property of the parties to the contract and when sold the proceeds therefrom be applied to paying the expenses connected with the sale of the lots.

The tract consisted of about 115 acres of farm land and was located from one-fourth to three-fourths of a mile from the city limits of the City of Litchfield, Illinois. Appellants paid to appellee the \$1,000 mentioned in the contract and had the land platted, but nothing further was ever done by the parties under the contract until the year 1910, except that appellants paid the interest on the note and some of the taxes. No lot was ever sold. In June, 1909, appellee conveyed to another party 45 acres of ^{the} tract and testified that he told appellants that he could not wait any longer for them to proceed under the contract and intended to sell a portion of the land. It is contended by appellants that they had no knowledge of this sale until about May 1st 1910, when they went to Litchfield for the purpose of advertising a sale of the lots, and it is the sale of this portion of the tract by appellee which they claim con-

stituted a breach of the contract and prevented them from proceeding under the terms thereof. There was evidence tending to show that the contract had been abandoned by the parties thereto and that several attempts had been made to sell the farm en masse by appellants. Appellee claims that his loss of crops from the land for the seasons from 1907 to 1910, by reason of the failure of appellants to sell the lots, were that off set the payment of \$1,000 and the interest and taxes and other expenses paid by them. ~~The contract itself is so ambiguous and so uncertain in its terms that it would be an exceedingly difficult matter to attempt to determine the rights and obligations of the parties thereto. The case as presented to the trial judge was one largely of fact and he was not called upon through any propositions of law or otherwise to give any legal construction to the contract. He heard the witnesses and passed upon the facts and we cannot say from the record before us that his finding in favor of appellee was erroneous.~~

The judgment must therefore be affirmed.

668

Gen. No. 6307.

October Term, 1914

Ag. No. 62.

Filed April 16, 1915.

Arthur Milliron, for the
use of J. P. Gately,

Appellee)

vs.

Electric Wheel Company,
Appellant.)

Appeal from Circuit court of Adams County.

193 I.A. 512

ELDRIDGE, P. J.

This action was instituted before a justice of the peace to recover from appellant, ~~who was~~ the employer of Arthur Milliron, for the price of a suit of clothes and two pairs of shoes sold to said Milliron by the Gately Credit Clothing Company. On an appeal to the Circuit Court Appellee recovered a judgment against Appellant for the sum of \$17.00. *from which it appeals.*

~~It appears from the evidence that Milliron by a written assignment dated January 4th, 1913, assigned and set over to the Gately Credit Clothing Company all wages or salary, commissions and credits due or to become due or payable to him in the next five years following his last pay day, from the Electric Wheel Company and every succeeding employer. Attached to the assignment is a power of attorney also executed by said Milliron in which he, in consideration of the delivery to him, his wife or any member of his family, of certain goods by the Gately Credit Clothing Company, does thereby irrevocably constitute and appoint J. P. Gately or any other person whom he may substitute and appoint his true and lawful attorney for him in his name, place and stead to execute and deliver to said Clothing Company an assignment or assignments or other instrument in writing which shall effectually and legally convey and transfer unto said Clothing Company any and all wages or salary due, or to become due or payable to him from any and every employer whom he may have within the next five years.~~

noted
Appellant was served with a notice signed by the Gately Credit Clothing Company, ~~stating that:~~ *such among much*

"We, the undersigned, Gately Credit Clothing Company of Quincy, Illinois, 519 Hampshire street, hold as Assignment of

Wages executed by Arthur Milliron, Quincy, Ill., who is now employed by you. The original assignment will be shown you if desired on application. You are further notified immediately on receipt of this notice, to hold all money due your employee, as same now legally belong and is payable to us, and your employee has no power to receipt for same, or any part of same until we notify you that this assignment has been released.

You are further notified that Arthur Milliron has duly appointed J. P. Gately his true and lawful attorney to effect final settlement of all claims against him due the Gately Credit clothing Company and to sign his name to any receipt or payroll in liquidation of assignor's indebtedness.

And you are hereby notified that the assignor owes said Gately Credit Clothing Company \$17.00 and said Company demands that you pay unto them all money (as above specified) when receipt and release will be granted."

J. P. Gately executed a power of attorney to M. G. Stolte, appointing him his true and lawful attorney for and in his name, place and stead to make or release any assignment or assignments of wages and to receive all sums of money which shall become due and owing to him by means of such assignment and to take all lawful means for the collection thereof, etc.

Appellant contends that ^{as} the suit ^{was} having been brought for the use of J. P. Gately, and not the Gately Credit Clothing Company, and there being no assignment of the wages to Gately, the judgement cannot be sustained. The only evidence as to who and what constitutes the Gately Credit Clothing Company, is that it is not a corporation and is under the "control" of J. P. Gately. ~~The suit should have been brought for the use of the Gately Credit Clothing Company as the evidence does not show that appellant was in any way liable to J. P. Gately personally under the assignment executed by Milliron.~~

The judgement will be reversed with the finding of fact to be incorporated therein that appellant does not owe appellee for the use of J. P. Gately the amount sued for nor any part thereof.

671

671

Gen. No. 6317.

October Term, 1914.

Agenda No. 65

Filed April 16, 1915-

Frank Steward,
Appellant.

VS.

;

Appeal from the Circuit Court of

A.M. Kitchell,
Appellee.

McLean County.

193 I.A. 526

ELDRIDGE, P.J.

Appellant filed a bill in equity for the purpose of setting aside a release, executed by him, releasing and forever discharging appellee from any and all causes of action, claims and demands which appellant then had or might thereafter have for injuries to himself and property caused by an automobile driven by appellee. The bill avers that the release was procured by fraudulent misrepresentations on the part of appellee, that appellant did not know its contents when he signed it, and that it ^{would} bar an action at law brought to recover said damages unless the same ^{was} is annulled and cancelled. Appellee answered the bill and filed a cross bill averring that appellant had brought an action at law against appellee for damages on account of said injuries and praying that appellant be perpetually enjoined from prosecuting said action at law.)

The issues made by the original bill, answer and replication thereto were referred to the Master in Chancery with directions to take the proofs. On March 28th, 1914, the Master made his report finding the equities in favor of appellee and recommending that the original bill be dismissed for want of equity. On the same day appellant made a motion to dismiss his bill, which was overruled on the ground that a cross bill was pending. Thereupon appellant made a motion to strike the cross bill from the files. On April 4th this motion was denied and a rule was entered requiring appellant to answer the cross bill. Appellant filed an answer to the cross bill April 11 and on the same day appellee filed exceptions thereto. On April 21st, the exceptions to the answer were sustained, and appellant was defaulted under the cross-

bill for want of an answer. The order approving the Master's report was thereupon set aside on motion of appellee, and the cause again referred to the Master to take further proofs upon the issues made by both the original and cross bills. The Master made his report under the last reference, finding the equities for appellee upon the original bill and cross bill, recommending the injunction issue as prayed for in the cross bill and that the original bill be dismissed for want of equity. The objections and exceptions of appellant to the Master's report were overruled, the report approved and a decree entered in accordance with the findings and recommendations therein.

It is urged that the chancellor erred in overruling appellant's motion to dismiss the original bill. Section 36 of the Chancery Act provides that no ~~any~~ complainant shall be allowed to dismiss his bill after a cross bill has been filed without the consent of the defendant.

The cross bill was germane to the original bill and there is ample evidence in the record to sustain the decree, which must therefore be affirmed.

A F F I R M E D .

*Re Denied
May 26 1915*

672

GENERAL NO. 6218.

OCTOBER TERM, A. D. 1914.

AGENDA NO. 40.

ARCHILLES W. COOK,

Appellee,

vs

CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY,

Appellant.

Filed April 16, 1915-

Appeal from Circuit Court

of Adams County.

193 I.A. 527

ELDREDGE, P.J.

~~The~~ action on the case ~~being~~ by appellee against appellant to recover damages for personal injuries alleged to have been received on account of the negligence of appellant. The first trial resulted in a disagreement of the jury. On the second trial a verdict was rendered in favor of appellee, assessing his damages at the sum of \$5,000, on which verdict judgment was entered, and from which judgment this appeal is prosecuted.

The accident occurred on ~~October 23rd 1914~~, on a public crossing at the intersection of Hampshire and Front Streets in the City of Quincy while appellee, riding on the running gears of a wagon drawn by a team, was passing over the same. The amended declaration consists of six counts. The first, second and fifth counts allege negligence on the part of appellant in not having a watchman or flagman at the crossing; the third, in not giving the statutory signals by bell or whistle; the fourth, in running the train at a speed in excess of 6 miles an hour, the limit fixed by an ordinance of said city; and the sixth, general negligence in the operation of the train.

Front Street, at the place of the accident, is the first street running north and south, east of the Mississippi River, and extends substantially parallel therewith. Hampshire street runs east and west terminating, apparently, from the plat introduced in evidence, at Front Street. Running north and south on

the western portion of Front Street are the main tracks of appellant Railroad Company. Between the river and the western track of appellant, running east and west on a line which, if extended, would be the center of Hampshire Street, was an open ditch. North of this ditch, between the river and the western track, was the Diamond Joe boat house. Some distance south of the ditch on the bank of the river, was a boat landing or wharf used by boats plying on the river at that time, to land their passengers and freight. West of the intersection of Hampshire and Front streets a plank crossing extended across the tracks of appellant. About in the center of the crossing was the flagman's shanty. Those who desired to go to the Diamond Joe boat house from Front Street, travelled northwesterly across the crossing north of the flagman's shanty, and those who desired to go to the wharf, passed southwesterly across the crossing south of the flagman's shanty. On the northeast corner of Hampshire and Front Streets was Adams grocery store. On the southeast corner of the same was Rupp's junk shop and south of the latter was a building occupied by Swift & Company. The first street north of Hampshire Street is Vermont Street, and the first street north of the latter is Broadway.

The train which caused the injury consisted of 15 loaded freight cars which were being backed, on a slight upgrade, south toward the crossing by a switch engine. The southernmost car was a low car loaded with crushed stone. The next car north of it was a high box car.

Appellee for some months prior to the accident had been engaged in hauling lumber from a mill in Missouri to the Knittle Show Case Works in Quincy, and in doing this, crossed the Mississippi River on a ferry boat, whose landing at Quincy was at the wharf mentioned. He had passed over this crossing a great many times and was perfectly familiar with the same and the surrounding locality. On the morning in question he had crossed the river on a ferry boat with a load of lumber and had delivered

the same at the Knittle Show Case Works at Quincy. He drove a team consisting of a horse and a mule attached to the running gears of his wagon, which were coupled out long for the purpose of accommodating the lumber, and on which there was no wagon box. After appellee had delivered the lumber, he started back towards the wharf to cross over the river for another load. He drove west on Broadway to Front Street, on which he drove south. When he reached a point near Vermont Street he heard some cars bumping behind him on the railroad tracks. At this time he was sitting on the running gears in about the center of the wagon. He looked back, saw the cars moving slowly toward him and states that they were at that time about 100 feet behind him and were going very slowly, about 3 or 4 miles an hour. When he reached Adams grocery store at the northeast corner of Hampshire and Front Streets he looked back at the train the second time, and stated, in one part of his testimony, that at that time the train was going a little bit faster than when he first saw it, but it was moving quite slowly and not more than 5 or 6 miles an hour. In another part of his testimony he stated that at the second time he looked at the train he thought it was running at the same speed as it was at the first time he saw it. Just as he was about to cross the tracks he testified that he looked at the train again, that it was moving very slowly and was about 60 feet away from him. He further testified that he drove on to the crossing as fast as his team could trot, and when he had nearly passed over the tracks the car at the end of the train hit the hind wheel of his wagon, causing him to be thrown to the ground and injured. At this time, he stated the train was running 20 miles an hour, in other words, that the train had increased its speed within a distance of 60 feet from a rate of 5 or 6 miles an hour to one of 20 miles an hour. He further stated that just as he was about to drive on to the crossing he

heard the bell of the ferry boat sounding as a signal that the boat was about to depart for the Missouri shore. His own testimony in this connection is as follows:

"If I failed to catch that boat it would have been one o'clock before I could have got another boat and got across the river to West Quincy. I wanted to get to my home in Missouri. I usually made two loads hauling lumber a day. In order to do that I had to catch the half past eleven boat. That was the boat I was trying to catch. It would be an hour and a half before another left the Illinois shore. If I missed it I could not make another load the same day without making it awful late. When I approached the crossing and about the time I started to turn I heard the bell of the boat sound. I observed the train three times up to the time of the accident. The last time I looked I was just going across the track. I never saw it any more until it struck me."

His own testimony clearly discloses the fact that he was very anxious to catch the ferry boat in order to return to the Missouri side for another load of lumber, and that all the time he was driving south on Front Street toward the crossing from a point north of Vermont Street, he knew this train was approaching the crossing, had looked at it twice before he turned west on Hampshire Street to pass over the crossing, and had looked at it a third time just before he went on to the crossing. It is apparent that he was attempting to beat the train over the crossing. We have very carefully considered all the evidence in this case and, while not discussing the testimony of the different witnesses in detail, in our opinion the clear and manifest weight thereof, established by the testimony of disinterested witnesses, is, that there was a flagman at the crossing who attempted to prevent appellee from going thereon by waving his flag, calling to him,

and, when he still persisted, attempted to catch hold of the bridles of the team to stop him from so doing. Also that the speed of the train at the time it struck the wheel of the wagon did not exceed 6 miles an hour, and that there was a brakeman on top of the box car, which was the second car north in the train, who also called out to appellee to prevent him from passing on to the crossing.

The remaining acts of negligence charged, viz., failure to have a brakeman on the rear car and to give the warning signals by bell or whistle remain to be considered. The only allegation in regard to the failure of appellant to have a lookout on the rear car of the train is found in the first count in the following language:

"By means whereof it, then and there became the duty of said defendant and said servants if said cars and engine intended to pass over said crossing, to station some person on one of said cars, or on the ground at said crossing, for the purpose of warning all who were about to go over said tracks at said public crossing to said ferry landing, that said freight cars and engine which were then and there being backed and switched toward said crossing, in manner aforesaid, were then and there about, and intended to cross over said public crossing," etc.

There is no allegation of any duty to have a person stationed on the rear car, but a duty is alleged to have a person on one of the cars, and this is stated in the alternative, either to have some person on one of the cars or on the ground at the crossing for the purpose of warning those who were about to cross over the same. There was a brakeman on the next to the rear car who gave warning to appellee. However, proof that there was no brakeman on the rear car was competent under the sixth count charging general negligence in the operation of the train. The

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absence of such brakeman on the rear car, under the facts in this case, could not have been the proximate cause of the injury, as appellee knew of his own knowledge that the train was approaching the crossing, and he was also given this information by the flagman, and by the brakeman on the car next to the end one. Under the statute there was no duty to have a brakeman on the rear end if the brakes were efficiently operated by power applied from the locomotive. There was no evidence as to how the brakes were operated.

The proof in regard to the failure to give the statutory signals by bell or whistle is conflicting. The train crew testified that the bell was rung automatically and was ringing all the time. Some of the witnesses testify that they did not remember whether the bell was rung or not; others that they paid no attention to it; some that they did not hear any bell, and one testified that there were so many bells and whistles sounding on the tracks by engines switching cars thereon, that he could not tell whether the bell or whistle was sounded on the engine attached to this train or not. It is immaterial, however, whether the signals were given, as the only purpose of such signals, if they had been sounded, would have been to warn the public of the approach of the train. Appellee had this knowledge and the failure to sound the warning signals, if there was such a failure, could likewise not have been the proximate cause of the injury.

The judgment must be reversed with the finding of fact that appellee was not exercising due care for his own safety immediately prior and at the time of the accident, and was guilty of negligence which contributed to the injuries complained of, which finding of fact is ordered recorded in the judgment of this court.

Handwritten: R.H. Danner May 26-1915

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193 I.A. 532

GENERAL NO. 6322. OCTOBER TERM, A. D. 1914. AGENDA NO. 74.

SUPREME COUNCIL OF WESTERN CATHOLIC UNION, Filed April 16, 1915-
Appellee, :
vs. :
OZRA SAULE, et al, FRANK P. DRENNAN, Appeal from
Appellant. Circuit Court of
Adams County.

ELDRIDGE, P. J.

The Supreme Council of Western Catholic Union ~~filed its~~
~~bill in the circuit court to foreclose a mortgage given to secure~~
~~a note, dated August 3, 1909, on which there was an existing in-~~
~~debtedness of \$3500, with interest. The note and mortgage were~~
~~executed by John T. White and Fanny White, his wife. The bill~~
~~makes John T. White, Ozra Saule, James V. Brady, John H. McMahon,~~
~~Frank P. Drennan and Will McConnell parties defendant, averring~~
~~that upon information and belief the defendants named, except White,~~
~~claim to have some interest in the premises embraced in the~~
~~mortgage.~~

Frank P. Drennan answered the bill and filed a cross bill
averring ~~that on February 25th 1913, said premises then being owned~~
~~by Robert C. Cox, together with his wife, on that day executed a~~ *said Cox,*
~~mortgage covering said premises to secure a note for the principal~~
~~sum of \$1500, payable to his order, bearing even date therewith;~~
~~against the maker of the mortgage and against~~
~~drivers, who had assumed the payment thereof, of the~~ *and asking for deficiency judgment* (over)

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mortgaged premises should not sell for enough to pay the whole of the mortgage indebtedness)

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that thereafter said premises were conveyed to one John H. McMahon, who thereafter conveyed the same to one James A. Roley, subject to said mortgage of \$1800, the payment of which Roley assumed by the deed; that Roley conveyed the premises to Ozra Saule subject to said mortgage, the payment of which said Saule assumed by the deed; that by reason of these facts if the said mortgaged premises should not sell for enough to pay the whole of said mortgage indebtedness that said cross complainant would be entitled to a judgment over against said Roley and Saule by reason of the assumption of the mortgaged indebtedness by them as aforesaid, and also against Robert C. Cox for any balance that might remain due on the note executed by him after the sale of said premises. The cross bill makes all the parties mentioned parties thereto.

One N. Bast held a third mortgage on said premises and was made a party to the suit, filed his answer to the original bill and to the cross bill of Drennan and also filed a cross bill setting up his rights by virtue of his mortgage. He does not join in the appeal and further mention of his cross bill is unnecessary.

After numerous delays, which appear to have been mostly caused by appellant, the Court entered a decree on the original bill foreclosing the mortgage held by appellee and left the questions of deficiency judgments against Cox, Roley and Saule claimed by appellant in his cross bill for further determination

claimed by appellant in his cross bill for further determination

and appellant has assigned error that the Chancellor had no authority to enter this decree upon the original bill without first having had a hearing upon his cross bill and having settled all the issues raised thereunder. There was no error in this. The issues raised by the cross bill between appellant, Cox, Roley and Saule were of no concern to appellee and in no way affected its interests under its mortgage which was a prior lien to that of appellant. Appellant by filing a cross bill could not delay the hearing on the original bill. Appellee was not compelled to wait until appellant had had an adjudication on the questions raised by his cross bill. *Myers v Manney*, 63 Ill. 211; *Hay v Bennett*, 153 Ill. 284; *Kelsey v. Claassen*, 257 Ill. 402; *Jones v Hillis*, 31 Ill. App. 403.

It is further urged that a deficiency decree would be void without provision therefor in the original decree, and the case of *Springer v. Lay*, 185 Ill. 542, is cited in support of this proposition. This case holds directly contrary to this contention and in the opinion it is stated:

"It is not contended that he was not liable personally for the debt, but the personal decree is objected to because the original decree did not provide for such personal liability or personal decree in case of a deficiency. Section 16 of Chapter 95 of the Revised Statutes provides that such a decree may either be rendered conditionally at the time of decree-

ing the foreclosure, or absolutely after the sale and ascertainment of the balance due. The method adopted here is expressly authorized by the statute. If the decree for the deficiency had been provided for in the decree foreclosing the mortgage it would have amounted to nothing more than a formal finding that the complainant would be entitled to a decree in the event that the property should not sell for sufficient to pay the debt."

It is urged that as the original bill averred that Fanny White executed the note and mortgage and no explanation is made in the bill as to why she was not made a party, that the original bill is bad for the omission of necessary parties. The evidence shows that she died several months before the original bill was filed and at the time of her death had no interest in the premises except an inchoate right of dower. Under these circumstances, while the original bill should properly have alleged these facts, yet as the evidence supplies this omission and shows that she was not a proper party, no rights of appellant can be prejudiced by the omission of such allegations in the bill.

The decree provides for an attorney's fee of \$238, and complaint is made that this is excessive. The amount was fixed by the Court upon the evidence taken in support thereof and under the facts and circumstances shown by the record in this case we are of the opinion that this is not excessive.

We find no reversible error in the record and the decree is affirmed.

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General No. 6323.

October Term, 1914.

Agenda No. 44-

Filed April 16, 1915-

Samuel C. Forsythe,
Appellee.

VS.

;

Appeal from the Circuit Court of

Samuel R. Killam,
Appellant.

Macoupin County.

193 I.A. 534

ELDRIDGE, P.J.

Appellee recovered a judgment in the sum of \$800.

against appellant in an action on the case to recover damages for an injury to himself and to his buggy resulting from a collision between said buggy and an automobile driven by appellant. The accident happened about 2 miles northwest of Carlinville. Both appellant and appellee were farmers, and appellant with a neighbor had left Carlinville about four o'clock in the afternoon to go to his home in the country. Appellee was also proceeding along the same road in the same direction in a buggy drawn by a team of horses. The accident happened in broad daylight, in an attempt of appellant to pass appellee on the highway. There is a direct conflict in the evidence as to the action of both parties at this time. The automobile driven by appellant ran into the buggy of appellee, smashed it, broke the couplings which connected the tongue with the buggy, causing the horse to run away and appellee to be thrown on to the ground and injured. The questions of the negligence of appellant and the contributory negligence of appellee were questions of fact for the jury to determine.

The only errors assigned involving questions of law are to the giving and refusing of instructions. We have examined the instructions carefully in the view of appellants criticisms thereof and are of opinion there was no reversible error in the rulings of the Court thereon.

No other errors are complained of and the judgment must be affirmed.

General No. 6332-

October Term, A.D. 1914-

Ag. No. 68-

Filed April 16, 1915-

Frank Adams.,
Appellee.

VS.

;

Appeal from the Circuit Court of
Sangamon County.

James Hogan.,
Appellant.

LEDREDGE, P.J.

193 I.A. 535

~~This is an action in trespass for an assault and battery alleged to have been committed by appellant upon the person of appellee, which resulted in the fracturing of both of the jaws of the latter. The trial resulted in a verdict for appellee assessing his damages at \$1,000.~~ ^{from a judgment upon} ~~for~~ ^{appellant appellee} Two errors are presented in the argument for appellant; first, that the verdict is contrary to the evidence, and second, that the court erred in the giving and refusing of instructions.

The controversy between the parties took place in appellant's saloon in the fall of 1913, about five o'clock in the afternoon. There were a number of witnesses present who testified on the trial. The testimony of those produced by appellant is in direct conflict with that of those produced by appellee. It was the province of the jury to reconcile the evidence and to pass upon the weight and credibility thereof. There is sufficient evidence to sustain the judgment, and the verdict having been approved by the trial court, this court cannot reverse it on the ground that it is contrary to the manifest weight of the evidence.

There was no reversible error in the instructions. The judgment must therefore be affirmed.

A F F I R M E D .

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GENERAL NO. 6260.

OCTOBER TERM, 1914.

680
AGENDA NO. 3.

Rehearing denied--Opinion modified--Filed
May 26, 1915.

ARTHUR W. FERRERIRA,
BY NEXT FRIEND ETC.,
Defendant in Error.
vs.
ISAAC R. DILLER,
Plaintiff in Error.)

ERROR TO SANGAMON.

193 I.A. 551

SCHOLFIELD J.

This is an action on the case by the ~~defendant in error~~
against the ~~plaintiff in error~~ to recover damages for personal in-
juries sustained by the ~~defendant in error~~ by being run over by an
automobile operated by the ~~plaintiff in error~~. *From a judgment*
in favor of the plaintiff for \$4000, the defendant appeals.
This case has been tried three times, and this is the sec-
ond appeal to this court. ~~The first trial resulted in a verdict in~~
~~favor of the defendant in error for the sum of \$3000, which verdict~~
~~was set aside by the trial court and new trial granted. The sec-~~
~~ond trial resulted in a verdict in favor of defendant in error for~~
~~the sum of \$5000. Judgment was entered on this verdict for the~~
~~defendant in error and against the plaintiff in error for the amount~~
~~of the verdict and costs, and the case was appealed by the plaintiff~~
~~in error to this court and the judgment was reversed and cause re-~~
~~manded by this court on account of the damages awarded being ex-~~
~~cessive. The third trial resulted in a verdict in favor of the~~
~~defendant in error for the sum of \$4000, upon which judgment was~~
~~entered and to reverse which judgment this writ of error is pro-~~
~~secuted. The facts in this case are fully stated in the opinion~~
~~of this court at the former hearing on appeal. (See Ferrerira v.~~
~~Diller, 175 Ill. App. 447.)~~

~~The declaration consisted of five counts. A plea of general~~
~~issue was filed to the first and second counts and a demurrer was~~ *sustained*
~~filed to the third, fourth and fifth counts. The demurrer was~~ *of the declaration*
~~sustained as to all three counts and leave was given defendant in~~ *sustained*
~~error to amend said counts. He amended the third, and fourth counts,~~
~~by erasing certain lines and the fifth count by changing the word "or"~~
~~to "and". The amendments were made on the copy of the original amend-~~
~~ed declaration and not on the original amended declaration. The copy~~

as amended was then refiled and the plaintiff in error then filed the plea of general issue to the declaration. ~~On the trial the court excluded the third and fourth counts and submitted the case to the jury on the first, second and fifth counts of the declaration. The plaintiff in error insists that as the fifth count was held bad on demurrer and was not amended and as the original amended declaration was not refiled it was error for the court to submit that count to the jury. This was not error. After the amendment changing "or" to "and" a rule was entered against the plaintiff in error to plead. He made no objection to the amendment but filed the plea of general issue and proceeded to trial. Having filed the plea of general issue to the entire declaration and having made no request to exclude the count from the jury he can not now raise the question that error was committed in that regard.~~

There is no other questions of law in the case. It is purely a question of fact and three juries having found in favor of the defendant in error we cannot well disregard the finding although the court feels a preponderance of the evidence is for the plaintiff in error, but it is not so clear that we can ^{over}turn it.

The evidence of all the disinterested witnesses tends to show the boy is not nearly as badly injured as he thinks he is and as soon as this suit is ended he will get well. ~~We feel however the judgment is still excessive and it will be reversed for that reason unless the defendant in error will remit his judgment down to \$2500, in which case the judgment will be affirmed for that sum.~~

IN THE
APPELLATE COURT
OF THE
STATE OF ILLINOIS

OCTOBER TERM, A. D. 1914.

ARTHUR W. FERREIRA,)
By next friend, etc.,)
Defendant in Error,)
vs.)
ISAAC R. DILLER,)
Plaintiff in Error.)

Error to the Circuit Court of
Sangamon County.

And now comes Arthur W. Ferreira, by his next friend,
John H. Ferreira, defendant in Error and remits the judgment of
the Circuit Court of Sangamon County, Illinois in the above
entitled cause down to Two Thousand Five Hundred Dollars.
(\$2,500).

ARTHUR W. FERREIRA,
By his next friend, JOHN H.
FERREIRA.

By GRAHAM & GRAHAM & JARRETT,
His Attorneys.

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Gen. No. 6261.

October Term, 1914-

Ag. No. 51.

Filed April 16, 1915-

The People of the State of Illinois,
Defendant in Error

vs. ;

Error to Christian.

John McDonald.,

Plaintiff in Error-

193 I.A. 553

Scholfield, J.-

Plaintiff in error was convicted on ~~16 counts of an~~
indictment charging him with a violation of the statute prohibiting
the sale of intoxicating liquor outside the incorporated limits of
any city, town or village, in less quantities than five gallons,
and not in the original package. ~~The indictment charged the plain-~~
~~tiff in error with the violation of the Act known as the "Five Gall-~~
~~on Law", Section 16, Chapter 43, Page 1023, Hurds Revised Statute,~~
1913. The plaintiff in error ^{motion} moved to quash the indictment and ^{and} ~~each~~ ^{which} ~~count thereof.~~ ^{appealed} The motion was overruled and a trial was
had before a jury which resulted in a verdict finding the plain-
tiff in error guilty of 16 counts. Judgment was entered on the
verdict by the court ^{and} fixing the penalty ^{fixed} against the plaintiff
in error at \$50. on ~~each~~ ^{each} count, and 30 days in jail on each of
the first ten counts, ^{the} and jail sentence to run consecutively,
the second beginning at the end of the first and continuing until
the entire time of 300 days is served out.

Counsel for the plaintiff in error frankly say that
the evidence tends to show that the plaintiff in error was enga-
ged in the sale of intoxicating liquor and that it is unnecessary
to make a statement as to the evidence.

It is first urged by plaintiff in error that the court
erred in overruling the motion to quash the indictment and each
count thereof.

Each count of the indictment avers that in the County
of Christian the plaintiff in error, on, etc. not then and there
having a legal license to keep a dram shop, unlawfully did then
and there sell intoxicating liquor in less quantities than five

gallons, and not in the original package as put up by the manufacturers, the said place where said intoxicating liquors were sold^{so} not being within the incorporated limits of any city, town or village, contrary" etc. ~~A conviction on an indictment in the exact language of this one was sustained in Tipton vs. People, 52 Ill.~~

~~App. 125, Affirmed in 156 Ill., 512-~~

The defendant says

~~Continued~~
~~The point attempted to be made is that the indictment is double and that it charges plaintiff in error with keeping a dram shop without a license and selling liquor contrary to the five gallon act, and for which different penalties are imposed. The answer is that the plaintiff in error would have claimed that unless the indictment had averred that plaintiff in error did not have a license to keep a dram shop the indictment would not have stated an offense, because he might have had a license granted by a County Board under Section 3 A. of the Dram Shopp Act, not in any city, village or town. The court properly overruled the motion to quash. We find no error in the giving or refusing of instructions and we cannot say in view of the evidence that the judgment is excessive.. The judgment is therefore affirmed.~~

A F F I R M E D.

Filed April 16, 1915-

THOMAS A. MULCHAY,
PLAINTIFF IN ERROR.)
vs.)
JOHN CULLINAN,
DEFENDANT IN ERROR.) ERROR TO TAKEWELL.
193 I.A. 555

SCHOLFIELD, J.

~~This was an action of assumpsit brought by the plaintiff, a real estate broker against the defendant to recover a commission for procuring a purchaser for real estate under an alleged verbal contract. There was a verdict and judgment for the defendant by the plaintiff that he was employed by the defendant to procure a purchaser for the defendant's farm; that he introduced Detrich to the defendant as a probable purchaser of his farm, and that the deal having been closed with Detrich he is entitled to a commission of \$2. per acre which he claims was promised him by the defendant.~~ *From the plaintiff's appeal*
claimed
the latter that the plaintiff
as

The defendant contends that he did not employ any agent and did not engage the services of the plaintiff; that the plaintiff did not act for him and did not render him any service and was not the procuring cause of the trade on behalf of the defendant, but was the agent and acted for ~~Detrich~~ *the purchaser* in the transaction in question, and was to receive his compensation from him.

~~We think the clear manifest weight of the evidence shows that Detrich and the defendant were negotiating for the exchange of their respective farms before the plaintiff appeared on the scene at all, and that Detrich had made the same offer to defendant before plaintiff claims his contract was made with defendant. The witnesses Maurer and Detrich had also made the same offer to the defendant before plaintiff claims he was employed by defendant. The manifest weight of the evidence sustains the defendant's version of the matter and this being true and the merits of the case being with the defendant, technical errors in the admission of evidence and in the giving of instructions should not reverse. Ford v. Ford, 267 Ill. 341. The Lehigh Valley Transportation Co. vs. Post Sugar Co. 228 Ill. 121. The judgment is therefore affirmed.~~ *The* *the purchaser*

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hearing argued May 25, 1915.

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GENERAL NO. 6286. OCTOBER TERM, 1914. AGENDA NO. 17.

Filed April 16, 1915-

FIRST NATIONAL BANK OF PAXTON, ILL.)
Appellee,)

vs)

JAMES H. SNELLING, FRANCIS E. SNELL-)
LING, LEVI W. ROOD,)
Appellants.)

-----)
APPEAL FROM FORD.)

VICTOR T. BRASSARD,)
Appellee,)

vs)

JAMES H. SNELLING, FRANCIS E. SNELL-)
LING, LEVI W. ROOD,)
Appellants.)

193 I.A. 565

SCHOLFIELD J.

The complainants the First National Bank of Paxton, and V. T. Brassard respectively and separately filed their bills against the defendants in aid of executions issued on judgments which they had respectively and separately received against the defendant James H. Snelling. By agreement in open court the two suits were consolidated and heard as one case and but one decree entered. The decree was in favor of the complainants and the defendants James H. Snelling and Francis E. Snelling appealed.

On November 18, 1911, the appellee, the First National Bank, exhibited its bill of complaint, and on the 23rd day of November, 1911 appellee Brassard, exhibited his bill of complaint; both bills of complaint named as defendants James H. Snelling, Francis E. Snelling and Levi W. Rood. The allegations of the two bills of complaint are the same with the exception of the details of the two different and separate judgments therein referred to; and the answers are the same with like exceptions; and therefore the substance of both bills and of the answers thereto may be included in the one statement of their contents.

The bill of complainant's bank alleged that the First National Bank, of Paxton, recovered a judgment on November 10, 1911, in the Circuit Court of Ford County against appellant, James H. Snelling for \$1014.16; and that the same judgment creditor obtained another judgment on the same day against the same defendant for \$1880.54; that appellee Brassard, recovered judgment in the Ford County Circuit Court against defendant, James H. Snelling on November 10, 1911, for \$3613, and that J. S. Williams and G. W. Stewart were also parties defendant to said judgment. That said judgments remained in full force and effect and not satisfied in whole or in part. That defendant James H. Snelling, then resided in Ford County, and that on November 10, 1911, executions were issued upon all of said judgments, placed in the hands of the Sheriff of Ford County, to be by him executed, and all of them were on the 15th day of November 1911, levied by the Sheriff of Ford County upon real estate which it is averred had previously been owned by defendant James H. Snelling, to wit: The Southwest Quarter and the undivided one-half of the Southeast Quarter of Section Eleven (full legal description stated in the bill) in Ford County, Illinois. It is alleged that after the indebtedness upon which said judgments were rendered had accrued, and prior to the rendition of said judgment, appellants made a conveyance of said property to defendant Rood, for pretended consideration of \$21,400; that said deed was filed for record in the office of the Recorder of Ford County, September 21, 1911. That after the making and delivery of said deeds, said Rood (his wife joining with him) conveyed said land to appellant Frances E. Snelling, for a pretended consideration of \$21,400.

It is alleged that said conveyances by appellants to Rood and Rood's conveyance to appellant, Frances E. Snelling, were merely shams and were made with the intention of defrauding appellees, and other creditors of James H. Snelling out of their just demands; that the recitals in each of said conveyances of the

consideration of \$21,400 were made for the purpose of concealing the fraudulent purpose of the grantors in each of said conveyances and that said consideration was not in fact paid between the parties to said conveyances; but that no consideration was paid by Rood to appellants and no consideration was paid by Frances E. Snelling to Rood. That said premises are now held by Frances E. Snelling in trust for the said James H. Snelling and for his benefit, and for the purpose of preventing a levy and sale of said premises under and by virtue of the said executions in said bill mentioned.

That by means of said instruments, James H. Snelling fraudulently attempted to put said lands out of the reach of his creditors and of complainant, as one of his creditors; and by the same means deprived himself of his property so that he is now a man of no pecuniary responsibility and is possessed of little or no property other than that so fraudulently conveyed by him as aforesaid, and is in embarrassed circumstances and involved in debt. That James H. Snelling has no personal or real estate liable to levy and sale except the aforesaid premises; and that although the sheriff has demanded of James H. Snelling that he pay the amounts due upon said judgments or turn over the property upon which the Sheriff made a levy, James H. Snelling has refused to pay same or turn out property and fraudulently insists that he has neither money nor property to satisfy the same.

The prayer for relief is that said conveyances be set aside, vacated and declared null and void. That the complainant be permitted to cause to be paid by the Sheriff the amount of said two judgments, interest thereon and costs by sale of said premises, under said execution, or upon other executions to be issued upon said judgments and general prayer for relief.

The defendant Rood defaulted and the defendants James H. Snelling and Frances E. Snelling filed an answer admitting the recovery of judgments and issuance of executions thereupon as

alleged in the bills of complaint, and the levy by the Sheriff of Ford County under said executions upon the land bought in this proceeding to be subjected to the payment of said executions.

They admit the conveyances of said land on the days alleged in the bill of complaint by appellants to Levi W. Rood and by Levi W. Rood to appellant, Frances E. Snelling. Defendants deny that said conveyances either of them were executed with fraudulent intent or for a fraudulent purpose; but on the contrary aver that said conveyances were made for the purpose of paying to defendant Frances E. Snelling, by means of a conveyance of said land, an indebtedness which was then owing to Frances E. Snelling by James H. Snelling amounting to \$21,400 and upwards. That said premises were then occupied by James H. Snelling and Frances E. Snelling his wife, as their home and dwelling place in consequence of which a homestead estate existed which could not be conveyed nor extinguished by a deed of one of said parties to the other, and that, for the purpose of more effectually transferring said property and particularly for extinguishing said homestead, said property was conveyed to Levi W. Rood and by him to appellant Frances E. Snelling. That said Rood paid nothing upon the transfer of said land to him and received nothing upon the transfer thereof by him to appellant, Frances E. Snelling.

Appellants deny that said conveyances were without consideration and deny that they were without adequate consideration, but aver that the consideration for both deeds was the same, to wit, the extinguishment of the indebtedness due at the time of the date of the first deed and for many years theretofore from James H. Snelling to Frances E. Snelling, and the extinguishment of said indebtedness was the consideration upon which said transaction was based. That said indebtedness originated as follows: appellant Frances E. Snelling is the daughter of the late Enoch Spradling, who died where he had resided for many years, in La Salle County, Illinois, possessed of a large estate, consisting of personal

property and farm land; that the share of Frances E. Snelling in said personal property was Five Thousand Six Hundred Dollars or thereabouts, which Frances E. Snelling received during May, 1883, that during the year 1884, James H. Snelling borrowed from Frances E. Snelling Four Thousand Six Hundred Dollars; and in 1887 James H. Snelling borrowed from Frances E. Snelling the balance of the aforesaid amount of her distributive share in her father's estate. That in the latter part of 1910 or the early part of 1911, a division took place between Frances E. Snelling and the other surviving children of her father of the lands held in common by all of said children which had descended to them from the father of Frances E. Snelling, and that as the result of said distribution, Frances E. Snelling received Four Thousand Eight Hundred Dollars, of which she loaned to James H. Snelling at that time, Eight Hundred Dollars, and in March 1911, she loaned him One Thousand Dollars more. That during the months of September, 1911, James H. Snelling and Frances E. Snelling had an accounting of said moneys loaned as aforesaid and ascertained that there was then due from the defendant James H. Snelling, to Frances E. Snelling, as principal and interest, the sum of Twenty-four Thousand Two Hundred and Ninety five Dollars. That the land so conveyed by James H. Snelling to Frances E. Snelling in payment of said indebtedness was then subject to a mortgage of Twenty Thousand Dollars, which is still unpaid and constitutes a lien upon said land. Frances E. Snelling thereupon agreed to take the equity of James H. Snelling in said property in full release, satisfaction and discharge of such indebtedness due from James H. Snelling to her to which James H. Snelling agreed; and thereupon the deed hereinbefore mentioned from appellants to Levi W. Rood was executed, but that, owing to the absence from her home of the wife of Levi W. Rood, the deed from Levi W. Rood and wife to appellant Frances E. Snelling was not executed until her return some days later. That upon the execution and delivery of said two deeds as part of the transaction, the

same was accepted by appellant Frances E. Snelling, as full release and discharge on her part of the defendant, James H. Snelling, of his indebtedness to her.

Deny that said conveyances, or either of them, were shams or that they were made with the intention of defrauding complainant or any creditors of James H. Snelling out of the just demand or demands of complainant or any creditor; but aver that said deeds were made in good faith for a bona fide consideration as above set forth; and aver that a full and adequate consideration therefor existed as above set forth.

Deny that said premises are held by Frances E. Snelling in trust for James H. Snelling or for his use and benefit or for the purpose of preventing a levy and sale of said premises; or that either of said conveyances were made with a fraudulent intent to put said lands out of the reach of the creditors of James H. Snelling.

Deny that by said conveyance, James H. Snelling deprived himself of his property so as to constitute him a man of no pecuniary responsibility, and deny that he is or was possessed of little or no property after the making of said conveyance. Deny that James H. Snelling has no personal or real estate liable to levy or execution other than the premises above mentioned, but admit and aver that said premises are not subject to execution upon judgment against defendant James H. Snelling. Deny that James H. Snelling has insisted, either fraudulently or otherwise, that he has neither money nor property to satisfy said executions, but admit that he has refused to pay said executions.

The defendants also claim in
~~by amendment to~~ their answer to the Brussard bill only,
~~appellants~~ aver that the notes on which complainant recovered judgment against Snelling, Williams and Stewart, were void and without consideration as against James H. Snelling. That ~~said~~ Snelling signed ~~said~~ ^{the} notes merely as an accommodation paper, and that the real makers thereof were Williams and Stewart; that Snelling was by

fraud and misrepresentation induced by Williams and Stewart to sign the same, upon the fraudulent representation made by them to said Snelling that there was a mortgage of Twelve Thousand Dollars upon the property which Snelling had purchased or traded for in Chicago, whereas in truth, there was only a mortgage of Nine Thousand Dollars on said property, and Snelling signed said notes with the understanding and agreement that there was a Twelve Thousand Dollar mortgage on said property; that said Stewart and Williams and one Jesse M. Brown sold to Brassard the notes in question, and aver that Brassard was informed and well knew at the time of the purchase of said notes that Snelling had signed same without any consideration; and in consequence thereof, appellee, Brassard required the said Jesse M. Brown to guarantee the note by endorsement thereon before Brassard would or did purchase the same. ~~Replications were filed to the answers and the cause referred to Master in Chancery to take and report proof to the court.~~

~~It is urged by appellants,~~ ^{she} ~~that~~ ^{claim} the evidence does not sustain the allegations of the bill and do not warrant the finding in the decree. The evidence shows that ~~the appellant~~ James H. Snelling is a farmer. ~~He and the appellant Frances E. Snelling were married in 1872, in La Salle County.~~ ^{that} In 1877 ^{he} Snelling bought the Southwest quarter of Section ~~Eleven~~ ²⁴ in Township Twenty-four North, Range Nine East of the Third Principal Meridian, in Ford County, for Forty-three Hundred Dollars. The first payment on the land was Two Thousand Dollars, which he borrowed from his father. ~~They~~ ^{He} ~~moved to Ford County to this farm in 1878.~~ In October 1885, Snelling and his wife bought the Southeast quarter of the same section, taking title thereto in their joint names, and entered into the possession and enjoyment of the same, as tenants in common. The quarter section bought by Snelling, and Snelling's undivided one-half of this quarter section so jointly purchased, is the land here in the controversy. The purchase price of this last quarter

section was ~~Fifty-five Hundred Dollars~~, which was paid in cash. ^{by}
The money to ~~purchase this quarter~~ ^{which} "came from the income of the
S. W. 1/4 of Section 11, the first farm we bought" "we worked
~~for it from the other quarter.~~"

On September ~~24~~ 1883, appellant Frances E. Snelling deeded certain land in La Salle County which she had received from her father's estate and for which she realized Six Thousand Dollars. This money was put into bank and was drawn out as needed, part for building, part in paying off mortgages and the remainder for improvements and other things. The record does not disclose that the money was loaned by Mrs. Snelling to Mr. Snelling. No note was given for it, by Snelling to his wife; no mention was made that its use created an indebtedness from him to her; no book entry was made of the same by either as a credit or a debit; no promise was made to repay it or request made for its repayment; no interest on it was ever mentioned; no accounting relative to it was ever had between the parties, until the twenty-eight years after its use, when they met at the house of their mutual friend Rood, in La Salle County, accompanied by the attorney employed by Snelling at the suggestion of Rood, and whose employment was expressly for the purpose of aiding Snelling to extricate himself from his financial entanglement resulting from an unfortunate trade for incumbered Chicago flat property. On February 20th, 1908, Snelling and wife, and each in his and her right, and as husband and wife, mortgaged the whole half section for Twenty Thousand Dollars at six per cent interest payable semi-annually, and evidenced by one principal note of Twenty Thousand Dollars, and ten interest notes of Six Hundred Dollars each, signed by both.

About March 1st, 1910, Rood paid Mrs. Snelling Forty-eight Hundred Seventy-two Dollars which was her portion of the final distribution of her father's estate realized from a sale to Rood of what remained from the father's real estate. It was not loaned by her to her husband. Eighteen Hundred and Seventy-two Dollars of

it was spent on the farm at different times; part for taxes and part in paying interest on the Twenty Thousand Dollar mortgage and in putting improvements on the farm.

~~The law is well settled that a wife may loan her separate property to her husband; and he can give her security which will be binding against both prior and subsequent creditors; but the law is equally well established that the mere fact of the wife letting the husband have her money to use is not sufficient as against other creditors. The actual contract or relation must appear by satisfactory evidence. When the rights of creditors are involved, the law will not, from mere delivery by her of money to him imply a promise to repay her, but will require more, either an express promise, or circumstances to prove that in such matter the husband and wife dealt with each other as debtor and creditor. While it is true in this case that the money of the wife was used by the husband, still there is no evidence of any kind that he was to repay her until he got in failing circumstances. It is next urged that the evidence does not show that appellees were innocent purchasers. We think the evidence fully shows that they purchased the notes in good faith and for an honest consideration. We think the evidence fully warrants the decree, and finding no error the decree will be affirmed.~~

Affirmed.

Filed April 16, 1915-

J. SCOTT HYDE, ADMINISTRATOR
OF THE ESTATE OF SAMUEL NIGGAR
RISINGER, DECEASED,

APPELLEE,

VS.

DANVILLE, ILLIANA & CHAMPAIGN
RAILWAY COMPANY.

Appellant.

193 I.A. 569

APPEAL FROM VERDICT.

SCHOLFIELD J.

~~This is an action in case by appellee against appellant to~~

~~recover damages for the alleged wrongful death of Samuel Niggar~~

~~Niginger, appellee's intestate. There was a verdict and judgment~~

~~for appellee against appellant for \$500.00. The declaration and~~

~~trinet four counts. The first count charged that the defendant~~

~~carelessly and negligently failed to use reasonable care to have~~

~~its right-of-way at and near the east side of Harvey Street free~~

~~and clear from bushes, brush, weeds and other material, and carelessly~~

~~ly and negligently permitted heavy dense bushes or brush of, to wit,~~

~~a height of six to ten feet to grow and be along the north side of~~

~~its said right-of-way from the east side of Harvey Street, eastward~~

~~a distance of some 40 or 50 feet which interfered with and obstructed~~

~~the view of said right-of-way by persons traveling southward upon~~

~~said Harvey Street at said point.~~

and

~~The second and third counts charged:~~ that the defendant

violated an ordinance ~~of the City of Urbana~~ by virtue of which it operated its railway through ^{the} ~~said~~ city by wilfully failing to construct or maintain any sidewalk crossing at its said right-of-way at ^{such} ~~Harvey~~ Street in ~~said~~ City. And by constructing and maintaining its said tracks at the crossing of Harvey Street higher and above the surface of ^{the} ~~said~~ street, to a height of ~~to-wit:~~ 10 inches.

and

~~The fourth count charged,~~ that the defendant negligently ran its car at a high and dangerous rate of speed across ^{such} ~~Harvey~~ Street. ~~It was also charged in each count of the declaration that the deceased at the time and just before he received his injury from which death resulted, was in the exercise of due care and caution for his own safety.~~

and

~~It is the principal contention of~~ ^{and} ~~appellant,~~ that the deceased at the time of the accident was guilty of contributory negligence in not using due care and caution for his own safety. The evidence shows Harvey Street ^{is a blind street running,} ~~runs~~ north and south across the railway tracks and ^{and} ~~is what is known as a blind street, ending at a point~~ about two hundred feet south of the railway tracks. ~~The crossing is in a~~ populous territory. ~~The first street east and parallel with Harvey Street is Goodwin Avenue. And the second street east of Harvey Street and running parallel therewith is Lincoln Ave. The appellant owns a private right-of-way forty feet wide running east and west and cross-~~

ing these streets at right angles. There is a double track on this right of way and appellant operated its cars on these tracks at the time of the accident. At the time of the accident there were two houses on the west side of Harvey Street south of the railway tracks and four on the east side. The only means of exit for the people living south of the railway tracks was to go north on ^{this} Harvey Street across the tracks. The first street north of the railway tracks and running parallel therewith is Springfield Avenue. The next street north of this intersecting Harvey Street, is Main Street. At the point of the intersection of Harvey and Main, Main runs slightly northwest and southeast. There was a brick sidewalk along the east side of ^{the} Harvey Street north of the railway tracks which extended southward to a point somewhere between the defendants track and the north line of its right-of-way. ^{and} There was a cinder walk south of the railway tracks on the east side of ^{the} Harvey Street. There were some trees, shrubbery and weeds along the north side of the appellant's right-of-way which began about ten feet east of the east side of ^{the} Harvey Street. The evidence tended to show that when a person was coming south on Harvey Street these trees and shrubbery obstructed ^{which} ^{a person's} view so that he could not see anything to the east for about fifty feet north of the track, that the trees all stood south of or immediately on the right-of-way line and most all of the shrubbery and weeds between the trees were on the appellant's right-of-way and that branches of

all of the trees extended over the line about six feet. The wagon crossing ~~at Harvey Street~~ was ~~constructed~~ of boards about sixteen feet long, three inches thick and ten inches wide, bringing the level of the crossing even with the top of the rails. One of these planks had been laid on the outside of the north rail of the north track, - and the action of vehicles in going off this plank in the wagon crossing had worn a hole or depression in the crossing at that point about the width of an ordinary vehicle and from four to six feet north and south, ^{with} ~~The evidence shows that there was~~ a space at either end of the crossing three or four feet in width, where the crossing was practically level. The grade of the tracks was about two feet above the surface of the sidewalk and the street; ~~that a brick sidewalk extended south on Harvey Street to a point within the right-of-way where it was covered up by cinders, from the place where the cinders began up to the track the cinders stopped with a grade of about two feet, but did not reach the height of the rail but reached approximately the tops of the ties so that the rail stood five inches above the surface of the cinders and the ties.~~ Witnesses for appellant testified that the speed of the car was from ten to twelve miles an hour while witnesses for appellee testified that the speed of the car was from twenty to thirty miles an hour. Decedent came ^{south on a bicycle} ~~west on a bicycle on Springfield Avenue to Harvey Street and then turned south in Harvey Street,~~ ^{and} as he approached the right ^{he} of way ^{he} ~~he angled to the southwest in attempting to cross the road cross-~~

ing of Harvey Street, when he struck the crossing he turned his bicycle north and just then the car hit him.

We think the evidence fully establishes negligence by appellant. It was its duty to maintain its grade at its highway crossing as provided in the ordinance. It is not denied that it failed to do so. The evidence shows that it allowed to exist at said crossing a deep depression six or seven feet wide and as long north and south which was a sudden jump off from the plank north of the line eight or ten inches deep. At the time of the injury the deceased rode up the angling path from the end of the sidewalk to strike the one spot where a crossing could be made. Necessarily prior to that time he could not see the cars coming and when he looked he evidently did not see the cars. As soon as he turned to the west the cars were to his back, and he had to give his attention to the guiding of his wheel up the grade to the south and west and could not look to the east. Manifestly the heavy foliage and the trees and the noises of the populous district prevented him from hearing the approach of the cars or their signals. Under the testimony of the motorman, as soon as deceased did hear the cars he turned to the right in an attempt to get off of the track and the motorman thought he was safe, was off the track, and released his brakes and suddenly deceased and his wheel were thrown towards the car, so that the deceased evidently lost control of his wheel and could not keep it to the right. There is no other expli-

ation of this other than that the condition of the appellant's crossing at said point where the deceased turned to the right in an attempt to get off the right-of-way was such that when he swung his wheel into such depression he absolutely lost control of it, was thrown so that the car struck him and threw him to the northwest and killed him. The jury under the evidence in this case had a right to believe that the dangerous condition of this crossing prevented the deceased from saving his life after he discovered the approach of the cars. We believe that the evidence fully established negligence on the part of appellant in maintaining a dangerous crossing. The question whether the deceased at the time and just before he received his injury from which death resulted was in the exercise of due care and caution for his own safety was a question of fact for the jury and only becomes one of law where the undisputed evidence established that the injury resulted from the negligence of the injured party. If there may be a difference of opinion on the question so that reasonable minds will arrive at different conclusions then it is a question of fact for the jury. Chicago City Railway Co. vs. Nelson, 215 Ill. 483. The ordinances were properly admitted in evidence, Conrad v. Springfield Ry. Co. 240 Ill. 12.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

General No. 6291.

October Term, 1914.

Agenda No. 21.

Filed April 16, 1915.

John H. Fought,

Appellee,

vs

Appeal from Shelby.

Jos . Schlitz Brewing Co.

Appellant.

193 I.A. 572

Scholfield, J.

John H. Fought, the appellee recovered a judgment for \$1000. against Jos. Schlitz Brewing Co., the appellant, for failure and refusal of appellant to deliver ^{beer} to appellee under a certain contract, *from which the defendant appeals.*

~~The contract is in writing and was entered into Nov. 17th, 1904, and by the terms thereof the appellee agreed to handle exclusively the beers of appellant in Shelby County, Illinois for a period of five years from date. Appellant agreed to loan appellee a beer wagon to be used by him in his beer business, and to further allow him five dollars for cold storage of each car load of beer handled by appellee under the contract, during the term. Appellant agreeing to deliver certain brands of draught and bottle beer to appellee free on board cars at Shelbyville Illinois, the price of keg beer to be five dollars and seventy five cents per barrel, and the bottled beer to be two dollars and seventy five cents per case, with a rebate to appellee of 40, 30, 20 cents for bottles and cases returned, appellant to pay return freight on empties.~~

In May, 1906, the city Council of the City of Shelbyville refused to grant license for the sale of intoxicating or malt liquors in the city of Shelbyville for the municipal year ~~beginning on that date and ending May 1907.~~ At ~~h~~ that time the appellee had on hand fifty-two half barrels of draught beer, *which* This he shipped back to appellant and was credited with its value on his account. In August 1906 appellant rendered appellee a bill covering their previous transactions showing a

Handwritten notes and a large, faint sketch of a map or diagram, possibly showing a coastline or geographical features. The text is mostly illegible due to fading.

Printed text, likely a letter or document, consisting of several paragraphs. The text is mostly illegible due to fading and blurring. Some words are difficult to discern, but the structure appears to be a formal communication.

balance due to appellant of seventy-two cents, ^{or there} This amount appellee paid. In May 1907 the city Council ~~of the city of Shelbyville~~ again granted license for the sale of intoxicating and malt liquors ~~in the City of Shelbyville~~ for the municipal year ~~beginning on that date and ending May 1908.~~ Appellees then made a demand on appellant for beer under their contract and appellant refused to let them have any, ^{on the ground} saying, that they considered the contract was terminated when the city council refused to grant license in May 1906. The appellee ~~then brought this suit~~ after the contract had expired by lapse of time.

~~The declaration consisted of two special counts based on the contract and the common counts consolidated. The pleas were the general issue and that the contract had been forfeited, terminated, and abandoned, and a plea of set-off. Appellant has not raised any question either by demurrer or by motion in arrest questioning the validity of the contract although it is very questionable whether there is any mutuality in it. Joliet Bottling Works vs Joliet Citizens Brewing Co., 184 Ill. App. 490. Higbee vs Rust, 311 Ill. 334. All appellees agreed to ^{do} was not to sell any other beer and pay for what beer he got. Under the contract he could not have been compelled to have bought any beer of appellant.~~

~~We think the evidence admitted by the court on the measure of damages was improper. If the appellee was entitled to recover on the contract then the damages would be what he had to pay to other parties to get beer of the same quality more than his contract price with appellant. His loss of profits and expenses in putting up ice had nothing to do with the damages. It was his duty to go out and buy beer of the kind and quality he had contracted for, and the excess he had to pay would be the measure of his damages. The majority of the court are of the opinion that the contract was terminated by appellant in May 1906 when the city Council refused to grant license because the appellee did not order or buy any beer of appellant for that year and made a full settlement with appellant paying it a balance due it, and that his conduct shows that he consid-~~

~~ered the contract closed. Judge Thompson, however, does not agree with this last proposition.~~

~~For the errors indicated the judgment will be reversed with a finding of fact that the contract was terminated by the actions of appellee in May 1906.~~

~~Reversed with a finding of facts.~~

Filed April 16, 1915-

Etta A. Gerdes,
Appellee.,

VS.

Appeal from Tazewell.

Samuel Niemeyer,
Appellant.

193 I.A. 574

Scholfield, J.

Action by Etta A. Gerdes a married woman, brought suit in the Circuit Court of Tazewell county against Samuel Niemeyer for board, lodging and washing, ^{in which she} and recovered a judgment against him for Eight-one Dollars, ^{from which the defendant appealed} It is first urged that the court erred in permitting Fred Gerdes, the husband of appellee to testify, when he testified in chief it was allowed on the ground that he was acting as agent for his wife. This evidence was simply that he presented the bill for board to appellant for his wife, and that appellant refused to pay it. The evidence was wholly immaterial to the issues in the case and could work no harm even if incompetent. However we think the evidence admitted by the court on that question was competent. He was again placed on the stand to testify ^{He also testified} in rebuttal and no objection was made by appellant on the ground of his incompetency, ^{current} and he was thoroughly cross-examined by appellant. No objection having been made at that time as to this competency it cannot be raised now in this court. City of Chicago vs. Hogan, 80 Ill. App. 349, Doty vs. Doty, 159 Ill. 46, Neil vs. Cornell 69 Ill. App. 60.

It is next urged that the court erred in not giving appellant's instructions 3 and 6. Appellant's refused instruction 3 is substantially the same as appellant's given instruction No. 3. The jury were fully instructed as to the law by appellant's given instruction No. 3, and it was not necessary for the court to repeat it. Instruction No. 6 was properly refused it does not state a correct principle of law. It was not necessary in order for appellee to maintain her suit that appellant had knowledge that

~~the husband of appellee had consented to her making a contract with appellant. All that is necessary is that the husband consented. There was no error in refusing the instructions. It is next urged that the verdict is manifestly against the weight of the evidence. The evidence was conflicting and it was the province of the jury to determine the weight to be given it. This court will not set aside a verdict when the evidence is conflicting even though it may be against the weight of the evidence, unless it is apparent the jury have been actuated by passion or prejudice. Miller vs. Belthasar 70 Ill. 306. And in this case we cannot say that the jury were actuated by passion or prejudice.~~

~~It is next urged that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. The newly discovered evidence is merely cumulative and the record does not show that it was discovered since the trial. New evidence to warrant the granting of a new trial must have been discovered since the former trial and must be material and not merely cumulative. Dyke vs. DeYoung, 133 Ill. 82.~~

~~On the whole we think the judgment substantially right. The evidence shows that for a part of the time the appellant boarded with appellee. he has not paid her or offered to pay her anything. Finding no reversible error in the record the judgment will be affirmed.~~

~~A F F I R M E D.~~

687

General No. 6903.

October Term, 1911.

Arizona No. 30

Filed April 16, 1915-

Returning here in additional copy to
file in case No. 193 I.A. 575

Lida Corbly

Appellee,

vs.

:

Appeal from Court

193 I.A. 575

Lindsey Corbly

Appellant.

action by & against the plaintiff's father in law

Scholfield, J.

This is an appeal from a judgment of \$10,000.00

in favor of the plaintiff

received by appellee against appellant for the alleged aliena-

tion of her husband's affections.

the defendant
appealed

The declaration consisted of three counts. The

first ^{count} charged that defendant contriving and wickedly
intending to injure the plaintiff and to deprive her of the
affection, society, aid, assistance and comfort of Fred
Corbly, the husband of plaintiff, did on the first day of
January, A. D. 1908, and on divers dates between that time
and the commencement of this suit, wilfully and maliciously
destroy and alienate from the plaintiff the affection of the
said Fred Corbly; by means whereof the plaintiff had
wholly lost and been deprived of the society, affection
etc. of the said Fred Corbly, and that plaintiff was damaged
in the sum of \$10,000.00.

Second count charges that plaintiff was married to

said Fred Corbly on the 25th day of December, A. D. 1890;

that they lived together as husband and wife from that date until August, A. D. 1911; that the said Fred Corbly treated her the plaintiff kindly and was a good and dutiful husband until about three years prior to the time he left her in August, 1911; that the defendant maliciously and wilfully alienated the affections of the said Fred Corbly from the plaintiff; that the said Lindsey Corbly was the father of the said Fred Corbly, and that the said Lindsey Corbly the defendant, was possessed of large amounts of money and real estate of the value, to-wit; of \$200,000.00, etc.

Third count charges that the defendant on the first day of January, A. D. 1903, knowingly, purposely and maliciously, began a systematic plan of poisoning the mind of the said Fred Corbly against the plaintiff, and endeavored to have the said Fred Corbly to leave and separate from the plaintiff, causing him to dislike her, by knowingly, purposely and maliciously making to him the said Fred Corbly slighting remarks, insinuations, and false statements about the plaintiff, also making insinuating and slighting remarks concerning plaintiff's relatives to the said Fred Corbly that he, the defendant would disinherit him the said Fred Corbly, if he failed to separate from the said plaintiff; that the said defendant continued his systematic plan up to the first day of August, A. D. 1911, when he finally succeeded in wholly alienating and destroying the affections of the said Fred Corbly from this plaintiff, the said

plaintiff in no wise consenting thereto, and on said last mentioned date the said Fred Corbly as a result of the efforts of said defendant deserted this plaintiff and she has since been deprived of the society, assistance and affection of the said Fred Corbly, to the damage of the plaintiff of \$10,000.00 etc.

The appellant contends that the evidence
~~It is urged by appellant that the evidence does not show~~
does not sustain the verdict.

~~that the defendant alienated the affections of her husband and~~

~~that the court erred in refusing to direct a verdict for the de-~~

appellee's tended to show
~~fendant. The evidence upon which appellee claims her right to~~

~~recover was that she had lived in Paxton all her life with the ex-~~

~~ception of five years, one of which she lived in Wichita, Kansas,~~

~~and four years in Auburn Park, Chicago; that Fred Corbly her hus-~~

~~band ^{was} a resident of Paxton ^{with as} ~~as was also the defendant~~ the father~~

~~of her husband; that her occupation was that of a milliner, that~~

~~she had been engaged in that business since the year 1893, and be-~~

~~gan her business in Paxton in 1892; that on the 25th day of December~~

~~1893, she was married to Fred Corbly; that on the next day after ^{her}~~

~~the marriage she and her husband returned to Paxton and lived~~

~~at the ^a ~~Macistone~~ Hotel for a period of two weeks; that she con-~~

~~tinued her millinery business and her husband Fred Corbly went~~

~~to school at Eureka, Illinois an' (that she furnished the money for~~

~~his tuition; that after graduating from the Eureka Business Col-~~

~~lege her husband returned to Paxton and engaged in the business of~~

shipping steek; that during the first few years of her married life that the defendant did not invite her to his house and would not speak to her or recognize her although he passed her almost every day and at one time in her store brushed right up against her and did not recognize her and that this treatment of her continued until after a revival meeting held about the year 1901, when the defendant came to her crying and asked her to forgive him, and that afterward she visited the house of the defendant and the defendant and his wife visited her home until the last two or three years prior to her separation from her husband; that during the first few years of her married life her husband had been affectionate and kind to her; that these visits and friendly relations continued up until the death of the wife of defendant which occurred in 1906; that at one time after the death of defendant's wife while they were eating breakfast she asked the defendant to pass her the pepper, and he asked "what are you going to use pepper for" and on her replying, "on my mush," he said, "Aint you got no sense at all to eat pepper on mush? Why don't you use cream on it?" that the appellant would come into her millinery store and in the presence of her husband would say that her father was an old drunkard, never amounted to anything, never made any money, only sit around and drink, and that her brothers were drunkards and they were all a pack of thieves, that they were degenerates and thieves; that

Sherman had married money and Henry had married money; that Jim had married into the Irish, and that Fred (the husband of appellee) had married no better. Along in 1908, the appellee and her husband had taken two little children to educate and raise and appellant told his son Fred in the presence of appellee that these two little girls had parents that were disgraceful and low down trash, and that he did not intend that any of his money should be spent on such children as those two little girls, and said if Fred continued to live with appellee in that way he would never get any of his money; that he would disinherit him entirely from his estate; that in 1910 appellant told Fred in the presence of appellee that if he continued to live with appellee he would get in the penitentiary as all Walkers ought to be in the penitentiary, that they were thieves and appellee wasn't any better.

Mrs. Dedrich, a sister of appellee testified that she was frequently at the home of the appellee and her husband and that from 1896 up to about 1910 the husband of appellee showed great affection for appellee; that in 1910 she saw Fred Corbly the husband of appellee slap the appellee on the head and become very angry and kicked things about the house; that in 1910 she heard appellant speak to Fred Corbly in the store about some trouble an Assyrian had girl^A in Paxton and he told Fred that if he wasn't gotstten out

of the Walker family the next thing he knew they would have him in

the penitentiary, and if they did he would get none of his money to help him, and also that if he did not get out of the Walker family he would disinherit him, that the Walkers were thieves and rogues, that when Fred Corbly would return from a visit to his father he would be very angry and kick things around the house.

Lizzie Walker another sister of appellee testified that she called at appellants house for the purpose of collecting some money appellant owed her and that appellant said to her if she would go to Lida Corbly and get her to give Fred a divorce without any public disgrace he would pay her every cent he owed her, and if she did not do so she could wait for her money.

A. T. Carlson testified that Fred Corbly was very affectionate to appellee that they frequently hired rigs of him up to 1910.

The evidence offered by appellant tended to show that the appellee had been married to a man by the name of Maddox prior to her marriage with Fred Corbly and that Maddox had obtained a divorce from her in Wichita Kansas on the grounds of adultery. That Fred Corbly had no knowledge of this prior marriage and divorce of appellee at the time he married her. That she married him under the name of Lida Walker, and in her marriage certificate in answer to the question as to the number of brides marriage she gave the answer "first"; that the marriage was kept secret from

Fred Corbly's parents for some time, Fred Corbly staying at his father's house; that the appellant finally heard of the matter and upon mentioning the fact to his son, stated to him that the proper place for a married man was with his wife and ordered him to go and live with his wife. The husband then went to live with appellee and they acquired a home. The appellant gave them considerable lumber for the purpose of building a house. This house was afterward sold and defendant erected a business block for the appellee to conduct her millinery business in, with a flat for residence purpose for appellee and her husband over head. The store room and flat was occupied by appellee in conducting her business and as a residence for herself and husband without paying rent upon it to the time of their separation and was continued to be occupied by appellee thereafter until the time of trial without payment of rent thereon. At one time defendant kept them in his home for two weeks. The evidence showed that Fred Corbly after living with his wife some eight or ten years began to be suspicious of his wife's faithfulness to him, and that he finally drifted into the habit of drinking and gambling. Fred Corbly testified that about the year 1905, the appellee seemed to lose her affection for him and that her attitude toward him changed, that she would go off on trips to Chicago to purchase millinery stock without being accompanied by him, and stay from sixty to ninety days during the fall leaving him at home alone. On one of these trips

she left in January and did not return until March. After one of appellee's trips to Chicago in the latter part of the year 1910 her husband discovered three letters hidden under a flowercase in her millinery department and they aroused his suspicions. These letters ~~he placed in a tin box in his safe. Coming down one day he found this tin box rifled and its contents scattered about and his wife had some letters concealed in her shirtwaist. The three letters which he had placed in the tin box were gone. He tried to get them from his wife but could not do so. A demand was made on appellee to produce these letters but the same were not produced. It was shown one of the letters was postmarked Chicago and addressed to appellee in care of Page Bros. a wholesale millinery house, and was written by ^{her} ~~the writer of the letter~~ asked her to meet him at a certain corner in Chicago and stated "they would go out and have a good time." It was signed with the name "Conk" who the husband testified was a travelling salesman for a wholesale millinery house; finally he found a deed among some papers of his wife conveying property in Wichita, Kansas, to Lida W. Maddox. At this time he had never heard of his wife's prior marriage or that she had ever been known by the name of Maddox. He took this deed to Attorney Phillips of Gibson City and asked Mr. Phillips to investigate the matter for him. On August 31, 1911 Mr. Phillips~~

and on making an investigation to learn
~~reported the result of his investigations to Fred Corbly and de-~~
~~livered to him a certified copy of a decree of divorce obtained~~
~~from his wife by one Simon A. Maddox, at Wichita, Kansas, her name~~
~~in reality being Lida M. Maddox. In the certified copy of the~~
~~decree shown him by his attorney, the District Court of Wichita,~~
~~found that his wife had been guilty of adultery with one~~
~~John Jones after she had been married to one Maddox. Prior to~~
~~the finding of this decree, the husband testified that his wife had~~
~~refused to permit him to occupy the same bed for a period of sev-~~
~~eral weeks. And when the decree was discovered, he at once left~~
~~and moved to a hotel. He testified that nothing his father had~~
~~said to him or in his presence induced him to leave his wife or~~
~~furnished any reason therefor, and that he left her because he~~
~~did not think she was true to him.~~

~~Our conclusion on a careful examination of the evidence is,~~
~~that taking the evidence most favorable to the appellee as true,~~
~~and drawing therefrom the inferences most favorable to appellee~~
~~that can reasonably be drawn therefrom, the evidence fails to~~
~~show that the appellant alienated the affections of the husband.~~
~~We believe however that the clear and manifest weight of all~~
~~the evidence shows not only that the affections of the husband~~
~~of appellee were not alienated by the appellant but that they were~~

~~alienated by the conduct of the appellee herself.~~

~~The case will be reversed with a finding of facts, that
appellant did not alienate the affections of appellee's husband.~~

~~Reversed with a finding of fact.~~

Corbly-
vs.

Rehearing denied- - Additional opinion filed

Corbly-

May 26, 1915-

In a petition for a rehearing it is contended that there is no assignment of error raising the question that the verdict and judgment are not sustained by the evidence.

It is assigned for error on the record that the trial court erred in overruling the motion for a new trial and one of the reasons in the motion for a new trial is that the verdict is contrary to the evidence. Under this assignment of error the question of the sufficiency of the evidence to sustain the judgment is raised.

Suttle vs. Agnew 202 Ill. 351; O.O. & F. R.R.Co., v. McMath, 91 Ill., 104; C. & R.I. R.R.Co. v. Northern Ill. Coal and Iron Co., 36 Ill., 60. I.B. & W. R.R.Co. vs. Rhodes, 76 Ill., 285.

It is also argued in the petition for rehearing that the court should have discussed other assignments of error. When any single question fully disposes of a cause there is no necessity to review other questions.

Filed May 26, 1915-

690

Gen. No. 5306.

October Term, 1914-

Ag. No. 33-

Filed April 16, 1915-

John Hillman,
Appellant.,

vs.

Appeal from Adams

John Stratman,
Appellee.

193 I.A. 581

Scholfield, J.

action

~~This was a suit by appellant against appellee to recover damages for the failure of appellee to purchase the 136-acre farm of appellant at the price of \$180. per acre according to a written contract entered into between them. The contract was dated November 13th. 1911, and provided that appellee was to pay \$2000. in cash, \$11,480. to be paid February 1st, 1912, and \$20,000. by note secured by mortgage on the premises. Appellee gave appellant a note for \$2000. for the cash payment provided in the contract. On January 2nd, 1912, appellee wrote appellant a letter stating he would not take the farm and appellant then brought ~~this~~ ^{which is} suit. During the trial appellant returned ^{at the trial} to appellee the note of \$2000. The trial resulted in a verdict and judgment for appellant for one dollar ~~was entered for~~ ^{from which he appealed.}~~

~~It is urged that the court erred in admitting in evidence the admissions or statements of appellant "that appellee had bought the land cheap, that it was really worth more than appellee agreed to pay for it". This was competent evidence, Springer vs. City of Chicago, 135 Ill. 557. It is next urged that the verdict of the jury was against the manifest weight of the evidence.~~

~~While the evidence was conflicting we can not say that it was against the manifest weight of the evidence. Considering all the evidence we are satisfied the jury were justified in returning the verdict for one dollar. No other question is presented for review and the judgment will be affirmed.~~

2H Denied May 26-1915-

693

Gen. No. 6320.

October Term, 1914.

Agenda No. 42-

Alvin Talbot and

FILED APRIL 16, 1915.

Clarence Shoot,
Appellees.,

VS.

; Appeal from Coles.

Atlantic Horse Insurance Company.,
Appellant.

193 I.A. 587

SCHOLFIELD, J.

This is a suit by appellees against appellant to recover upon a policy of insurance issued by appellant to appellees on the life of a horse which died during the term covered by the policy.

The declaration sets out the policy in full and avers the payment of the premium and the death of the horse. Numerous pleas and replications were filed but were all withdrawn except the general issue, and an agreement was entered of record that all defences proper under any state of pleadings, might be offered under the general issue. A trial was had by a jury which returned a verdict in favor of appellee for \$1000.00 on which judgment was entered and to reverse which this appeal is prosecuted.

The policy was delivered to ^{Plaintiffs} ~~appellees~~ on the 20th-day of January 1913 and by its terms commenced at noon on the 22nd-day of January 1913, and was for the term of one year.

The horse took sick on the 21st day of January 1913, and died about one thirty in the afternoon of the 23rd. of January, ~~1913~~ ^{was} 1913. It is claimed by ^{Plaintiffs} ~~appellees~~ that the sickness of the 21st was not the cause of the death of the horse on the 23rd, but in the forenoon of the 23rd the horse became sick from another and different disease, and died the same day.

By the third clause of the policy it ^{was} ~~is~~ provided, that in the event of said animal's sickness, that it ^{should} ~~shall~~ be the duty of the insured to immediately procure the services of a veterinary, and that the insured ^{should} ~~shall~~ also notify the Atlantic Horse Insurance Company, Providence, Rhode Island by sending a telegram

immediately, and shall also send a registered letter within twenty four hours if the animal become incapacitated. "And the failure to perform any of the requirements above mentioned in this paragraph, if death ensue, shall relieve the company of any and all liabilities under the policy".

It ^{was} ~~is~~ admitted by ^{plaintiff} ~~appellee~~ that ^{these} ~~this~~ provisions of the policy ^{were} ~~is~~ valid and that a telegram ^{not} ~~was~~ sent to ^{defendant} ~~appellee~~ as required by it. The evidence shows ^{that} ~~that~~ the horse died about one thirty and that Talbot who lived out of town a couple of miles on a farm where the horse was, notified E.D. Stull, the agent of the company and that Stull went out about 2:30 and came in and sent a telegram to the Atlantic Horse Insurance Company at Providence Rhode Island, and wrote a letter that same evening to the company. The evidence shows ^{that} ~~that~~ the telegram was actually received by the Company at 5:23 P.M. of the same day. The telegram stated ^{that} ~~the~~ horse had taken sick that morning at ten and died about 2:30. The letter was more in detail. On the 25th after receiving the telegram and letter the company cashed a check for the premium. Afterwards the company sent blank proofs of loss. The proofs of loss were completed Jan. 30th and sent in. On the 18th of March the company denied liability and returned the premium

which was refused by ^{plaintiff} ~~appellee~~. This ^{was} ~~it is~~ contended by ~~appellee~~ ^{plaintiff} ~~was~~ ^{to be} a waiver of the notice required in the third clause of the policy. The horse ~~was~~ taken sick on the morning of the 21st and there is nothing in the record to show that he recovered from that sickness before his death. Whether the horse died from the sickness contracted on the 21st or from another disease contracted on the 23rd, we think it of little importance. The horse was being treated by Talbott for the sickness contracted on the 21st at the time it was discovered he had another disease and from which ~~he~~ ^{plaintiff} ~~appellee~~ claims he died. Whether he died from the sickness contracted on the 21st or not it is evident that when he died he had not recovered from that sickness and the company under the terms of the policy was entitled to have notice of that sickness as required by

Policy. There ^{was} ~~is~~ no evidence in the record that at the time the company cashed the check for the premium or that at the time the proofs of loss were sent that the appellant had any notice whatever that the horse had been sick prior to the 23rd. The appellant under the evidence did not waive its rights to have notice sent to it by telegrams as required by the policy. Miller v. Union Central Life Insurance Co., 110 Ill. 102, Hyman v. Mar. & Mer. Life Association 262 Ill. 300.

When a policy requires immediate notice of sickness, accident, death etc., and provides that failure to give it shall void the policy, no recovery can be had if there is a violation of the condition. Illinois Live Stock Insurance Co. v. Kirkpatrick, 61 Ill. App. 74. Green v. N.W. Livestock Insurance Co. 54, N.W. 344. Johnson v. N.W. Livestock Insurance Co. 83 N.W. 64. Swan v. Security Live Stock Co., 43 N.W. 104.

The agreement to notify by a telegram immediately is a binding agreement and the failure of the appellees to comply therewith ~~definitely~~ defeats their right to recover under the policy. Errors are assigned as to the giving and refusing of instructions but the view we take of the case it is not necessary to consider them. The case is reversed with a finding of facts that the appellees failed to give appellant notice by telegram immediately of the sickness of the horse as required by the third clause of the policy, and that appellant did not waive that notice.

Reversed with finding of facts.

695

Gen. No. 6325.

October Term, 1914-

Ag. No. 46-

Filed April 16, 1915-

Jennette Cox, an infant etc.,

Appellee.,

VS.

APPEAL FROM MACCUPIN.

St. Louis, Springfield &

Peoria Railroad .,

Appellant.

193 I.A. 596

SCHOLFIELD, J.

This was an action to recover damages for injuries sustained by appellee a child seventeen months old, ^{Plaintiff} who had strayed near ~~appellee's~~ ^{defendants'} railroad tracks, and was struck by one of ~~appellee's~~ ^{defendants'} interurban cars, ^{which} ~~that~~ was running at a higher rate of speed than was permitted by the ordinance of the city, ^{and which} ~~crushing~~ her skull to such an extent that it was necessary to remove a portion of it.

There was a verdict and judgment for appellee for \$900.

The declaration contained two counts, the first charges the duty of the defendant to be "to exercise and keep reasonable lookout x x x x in order to discover and avoid injuring" persons on or near said tracks; that defendant "did not use ordinary care or any care whatever to keep a reasonable lookout to discover plaintiff x x x but kept no reasonable lookout whatever and as direct consequence thereof did not discover the plaintiff but run said car upon said plaintiff, thereby injuring her" etc., whereby it was charged she "was also rendered permanently injured, maimed and disfigured".

The second count charged the existence of a speed ordinance for electric railroad cars within the corporate limits of the city of Staunton, and that the car was running at a greater rate of speed than that permitted by the ordinance to-wit, ten miles per hour.

The child was not actually from the accident

It is first contended by appellant that there is no testimony in the record that the place of injury was within the corporate limits of the City of Staunton. The place of injury is described in the declaration as being on Union Street in the city of Staunton near the intersection of that street with Monticello Street, in the same city. The evidence fully established the fact that the child was injured at the place described in the declaration, and the evidence is sufficient to establish the fact that the place where the accident occurred was within the corporate limits of the city of Staunton. It is next contended by appellant that the ordinance of the City of Staunton was improperly admitted in evidence. The ordinance was printed in book form and purported to be published by authority of the City Council of the City of Staunton, and under the statute of this state was properly admitted.

It is next urged that the verdict and judgment are excessive. The child has completely recovered from the injury and while we are inclined to believe that the verdict and judgment are a little high still we cannot say they are excessive and that the judgment should be reversed for that reason.

We find no error in the giving or refusing of instructions. Finding no reversible error in the record the judgment will be affirmed-

A F F I R M E D .

RH Demand May 26-1915

696

Gen. No. 6333.

October Term, 1914-

Ag. No. 69-

Truman's Pioneer Stud Farm,
Appellee.

Filed April 16, 1915-

VS. ; Appeal from Moultrie.

Zion F. Baker, J.F. Fleming,

J.H. Baker and Mary C. Baker,
Appellants-

193 I.A. 598

Scholfield, J.

This is a suit by appellee against appellants on a promissory note given by appellants to appellee for the purchase price of a stallion and this is the second time the case has been appealed, to this court. The facts in the case are fully stated in the former opinion of this court. (Truman's Pioneer Stud Farm v. Baker, 176 Ill. App. 524)

The horse was bought in the spring of 1907 and notes given. There ^{was} ~~is~~ a written warranty of the stallion to be an average foal getter, (if bred to any reasonable number of good breeding mares, said mares to be regularly returned, tried, and bred), and if he should prove otherwise, he ~~shall~~ ^{should} and must be returned to Truman's Pioneer Stud Farm at Bushnell, Illinois, and another stallion of the same breed, but of no greater value, taken in his place.

At the end of the first year the horse having not proved up to the warranty, by agreement of the parties the trial and warranty were extended another year or to March 1909. In February 1909 defendants appellants here, tried to talk with Truman over the telephone and say ^{that} he refused to talk, ~~and~~ Truman ^{said} ~~says~~ he refused ~~him~~ ^{that he} to talk, except ^{to} he said ^{to} return the horse. Defendants do not claim there was any extension for another year or any waiver of the contract by Truman. The defendants kept the horse the third year without attempting to return him or having any further agreement.)

The only remedy for the breach of the contract was to return the horse, they could not sue for damages, or offset damages for breach when sued on the notes. Case Threshing Machine Co. v. Puls, 158 Ill. App. 1, Kamp v. Freeman 42 Ill., App. 500.

They have not proved any defense and the court might have directed a verdict.

On the former trial of this case it appears from the former opinion it did not appear that the horse was kept a third year without any agreement as now appears in this record.

It is contended that the court erred in rulings on the evidence. The evidence offered would have been proper if there had been an agreement of extension of the warranty but there not being any agreement of extension of ~~the~~ waiver of the warranty the evidence was immaterial.

The appellants assign for error that the trial judge was out of the room during the final argument and counsel made improper remarks. While the action of the court was erroneous it was harmless, as a verdict might have been directed and no other judgment can be sustained under the evidence.

It is also urged that in March 1910 defendants and plaintiffs agreed on an exchange of horses. This was an independent trade and while it was the horse bought yet there was no waiver of the contract but simply an offer by Truman to make an exchange and if an exchange was agreed upon and the parties failed to carry it out that is an independent matter involving a breach of contract, the damages in which are unliquidated and could not be set off in a suit in assumpsit, Higbie v. Rust, 211 Ill. 333- Owen v. Wilber, 208 Ill., 492.

Finding no reversible error in the record the judgment will be affirmed.

A F F I R M E D .

H. Danvers
May 26-1915

698

Gen. No. 6239.

October Term, 1914.

Ag. No. 73-

Filed April 16-1915

Kinch Tudor,
Appellant.,

VS.

Appeal from Houltrie.

F.H.Phipps,
Appellee.

193 I.A. 608

Thompson, J.

Action of
~~This is a suit in replevin brought before a justice~~
of the peace in September 1911. *On* An appeal to the circuit court was
~~taken from the judgment of the justice. In the circuit court on~~
September 30, 1912, ~~at the close of the evidence for the plaintiff~~
the court instructed *directed* the jury to return a verdict in favor of the
defendant. On *that* ~~the same day~~, *on* a motion for a new trial *was* made and
overruled, and judgment was rendered against the plaintiff. The
plaintiff ~~on that day~~ prayed an appeal to this court, which was
allowed upon the plaintiff filing a bond in the sum of \$200. with-
in twenty days ~~from that date~~, and a bill of exceptions within
ninety days.

The common law record, made by the clerk of the cir-
cuit court, shows that on October 21, 1912, plaintiff filed with
the clerk a motion to set aside an order overruling a motion for
a new trial, the entry of judgment and the order fixing the time
to file an appeal bond. *and that a similar motion was also filed*
On November 13, 1912, ~~a motion similar~~
~~to that filed on October 21, was filed with the clerk.~~ On January
9, 1914, at the September Term 1913, the motions to set aside the
judgment etc. were overruled. *and* On January 24, 1914, the plaintiff
again prayed an appeal to this court, which was allowed on filing
a bond in the sum of \$100. within twenty days, and a bill of excep-
tions within 100 days. On February 13, 1914, the plaintiff filed
a bond in the sum of \$200. and on May 4, 1914, a bill of exceptions
was filed.

which showed
The bill of exceptions shows neither a motion for a new trial on September 30, 1912, nor anything that occurred subsequent to the entering of judgment on *court on that day when* September 30, 1912, further than the prayer for an appeal *made on that day. Neither does*

(The bill of exceptions contains nothing as to any motions or rulings thereon at the March term 1914, and therefore no exception is preserved as to any proceedings subsequent to the September Term, 1912, . "The rule is well established that when a party desires to assign error on the decision of the court on a motion, the ruling of the court and the exception should be preserved in the record by a bill of exceptions." C.R.R. & P. R.R.Co., vs. Town of Calumet; 151 Ill. 512; People vs. Ellsworth, 261 Ill. 275; Aden vs. Road District, 197 Ill. 220.

The only bill of exceptions (filed was) ~~that which was filed~~ on May 4, 1914. The time for filing a bill of exceptions given in September, 1912, after a final judgment had been entered, was never extended. ~~If the bill of exceptions filed May 4, 1914, had shown the motions made subsequent to the time of entering the judgment on September 30, 1912, and the orders made thereafter, which are shown by the clerks record, then under the law as announced in Hasking vs. Southern Pacific Co., 243 Ill. 320; Hearson vs. Grandine, 87 Ill., 115 and Village of Hinsdale vs. Shannon, 182 Ill. 312, the court would have retained jurisdiction over the case, and a bill of exceptions filed under leave of court, after the final order of the court denying the motion to set aside the entry of judgment on September 30, 1912, would have given this court jurisdiction over the case.~~

~~The bill of exceptions showing neither any motion made, order of the court or any prayer for an appeal, subsequent to September 30, 1912, nor any time granted within which to file a bond or bill of exceptions after that date, does not show any appeal prayed or allowed which authorizes the filing of the bond filed on February 13, 1914, or the bill of exceptions filed May 4, 1914. The only prayer for an appeal shown by the bill of exceptions is that~~

~~of September 30, 1912, which limits the time within which it must be filed to 90 days. The bill of exceptions filed more than one year thereafter was filed without right.~~

~~The motion of appellee to strike the bill of exceptions from the files will be allowed. The bill of exceptions is ~~here~~ stricken from the files, and as no question that has been argued by appellant is saved for review, the judgment is affirmed.~~

A F F I R M E D.

Gen. No. 6923.

October Term, 1914-

Ag. No. 52-

Edwin L. Foell,

Appellant.,

vs.

;

Christ Rasmussen,

Appellee.

Filed April 16, 1915-

Appeal from

~~Superior~~ to Christian.

193 I.A. 609

Thompson, J.

~~This is an action on the case brought by Edwin L. Foell, against Christ Rasmussen to recover damages for the loss of a leg caused by the discharge of a gun in the hands of defendant. The jury returned a verdict for the defendant, on which judgment was rendered. The plaintiff appeals.~~

~~The evidence shows that appellant resides in St. Louis and that appellee is a tenant farmer residing near Stonington, Illinois. Appellant and appellee are related by marriage to a witness, Guy Johnson, who lives in Taylorville. They first met on Thursday, January 9, 1913, when appellant in company with Johnson and one Charles Sternberg, who resides in St. Louis, went to Stonington, Illinois, to meet appellee. Appellee borrowed a gun for the use of appellant from a neighbor. Appellant and Johnson with others went hunting on ^{new} Friday and Saturday. Appellee was hunting with them on Saturday. On Sunday morning there was a little snow on the ground and appellant with appellee, Johnson and two other parties went hunting rabbits in the corn field of a neighbor of appellee in which the corn stalks had been tramped down. They hunted in two parties. Appellant with appellee and Sternberg, who had been brought to appellee's house by Johnson, and one Sorrensen who did not have a gun, remained near together. About dinner time a rabbit was wounded and appellant, appellee and Sorrensen ran after it and then started to walk back east to Sternberg, when a rabbit started up a few feet in front of them. Appellee was in~~

in the direction of the ²-appellant, who was there,

~~the center of the three with appellant on the right and Sorrensan on his left, all only a few feet apart. Appellant shot at this rabbit and missed it. The rabbit ran around to the right. Appellee turned to shoot at the rabbit and as he turned, pulled back the hammer of his gun, ^{put his gloved hand where} ~~He had gloves on and says his fingers were~~ ^{slipped from} ~~numb~~ ^{numb} and the hammer slipped from his thumb and discharged, the gun hitting appellant in the calf of the leg causing a wound, which necessitated the amputation of the limb.~~

Appellant insists the court erred in admitting evidence that he was a guest of appellant and stayed at appellee's house sleeping and getting his meals there until Sunday morning. There was no objection to any of the evidence so that question is not saved for review.

other-

The only contention of appellant is that the verdict is against the manifest weight of the evidence.

The evidence shows that appellant and appellee were within a few feet and in plain sight of each other. Appellee testified appellant missed the rabbit and turned to shoot it at it and "as I turned I was pulling the hammer back, my fingers were numb and it slipped out of my thumb and discharged just as it got even with his leg". The appellant was not in front of appellee; appellee's testimony is that he turned towards appellant and the gun was discharged by his act as the range of the gun was passing appellant. It would appear that appellant was not negligent as he was partially behind appellee and did nothing to get in the range of the gun, but appellee by turning in the direction of appellant pointed the gun in his direction while trying to raise the hammer end of the gun. Appellee knew the condition of his hands and the fact that the hammer slipped from his fingers and discharged the gun, does not excuse ~~him~~ his negligence in pointing the loaded gun towards appellant when he was within a few feet of him. The injury was the result of an accident but not an unavoidable accident, since it was the result of a force put in motion by the appellee.

It a person is injured by the discharge of a gun in the hands of another, who has entire control of it, the burden is cast upon the latter to prove that the shooting was inevitable and without fault on his part. Atchinson vs. Dullam, 16 Ill. App. 42. We think it clear that appellant was injured by the negligence or carelessness of appellee for the reason it is negligence knowingly to point a loaded gun in the direction of a person. The court erred in not granting a new trial. The judgment is reversed and the cause remanded for another trial.

R E V E R S E D & R E M A N D E D .

1713
RT Denied May 26-1915

Gen. No. 6288.

October Term 1914.

Ag. 19.

Filed April 16, 1915-

O. G. Leverich, Appellee.

vs.

Appeal from Vermilion.

Danville Collieries Coal
Company, Appellant.

193 I.A. 627

Opinion by Thompson, J.

action
~~This is a suit brought by O. G. Leverich against the Danville~~

~~Collieries Coal Company to recover damages for personal injuries averred to
have been sustained by him while in its employ as a coal miner. The first
and second counts of the declaration aver a wilful violation of Section 21
of the Miners' Act in that the defendant permitted plaintiff to enter its
mine and work therein, without being under the direction of a mine manager,
while a dangerous condition existed in room No. 11. All the counts read
facts, which it is averred constituted the dangerous condition. The third
count avers a wilful violation of the same section of the statute in that
defendant wilfully failed to place a conspicuous mark at the dangerous place.~~

by display
The plaintiff recovered a verdict and judgment for \$5,000 from which
the defendant appeals. The evidence shows that the appellee had turned
the room and had worked ~~in it~~ *in a room with* about 40 days. There was a horse back in the
neck of the room which caused the grade to be slightly upwards from the
entrance and then, from the edge of the horse back, there was for a few feet
a sudden decline into the room. A car track of iron rails was laid from the
entrance of the room to the edge of the horse back nearest the face of the

^{and}
room. Wooden rails were laid in the room from the end of the iron rails.
The wooden rails from the point where they joined the iron rails to the end
of the decline had been raised upon cross ties to a height of from six to
^{from 6 to 14 inches deep}
fourteen inches. This made a hole ¹ between the wooden rails, the horse back
and the cross ties at the edge of the horse back. ~~Appellee testified that~~
~~the hole was 14 inches deep, while the assistant mine manager testified that~~
~~it was only six inches deep or possibly a little deeper. Other witnesses~~
~~put it at an intermediate depth.~~ From the edge of the horse back, the track
descended very rapidly so that in the space of a few feet, - from five to nine -
the track was level and on the rock. ~~The appellee testified that~~ when cars
were pushed into the room, as they passed over the horse back, they would
suddenly lurch forward and that ^{the appellee} ¹ had to hold and steady them as best he
could to prevent them from jumping the track and knocking timbers down; that
he had talked about the condition to the mine manager several times and that
the mine manager promised to have the condition remedied as soon as some iron
rails could be procured. The appellee further testified that on December
28, 1910, as he was pushing a car into the room for the purpose of loading it,
while attempting to hold it, as it went over the ridge, it jerked forward and
pulled him into the hole and that his foot was caught and he was wrenched and
his hip twisted. Appellee, although sick with pain, continued at work with
difficulty that afternoon. On the way home he had a chill, his leg pained
him and swelled up badly that night. He worked a little the next day and



then went and consulted ~~Dr. Hundley~~ ^{a physician}, who told him that his trouble was rheumatism caused by a sprain and that exercise would do his leg good. Appellee worked more or less for about two weeks during which time Dr. Hundley treated his leg which was badly swollen. Appellee continued going to ~~Dr. Hundley~~ ^{him} for treatment about five weeks; he then went to Dr. Landauer for treatment for several weeks. The latter physician sent him to Mudlavia for a week in March to see if treatment there would not reduce the soreness and swelling. In April Dr. Landauer discovered that the hip joint was dislocated and took appellee to a hospital where with other doctors an operation was performed. The hip joint was opened and it was found that the rim of the acetabulum was broken and several loose pieces of bone were removed. ~~The leg is now nearly two inches shorter. For over two years appellee was able to do but little work of any kind.~~

It is contended by appellant that the condition of the entrance to ~~the room was not as testified to by appellee and further that, if that was its condition, it is not such a dangerous~~ ^{one} ~~condition~~ as is within the meaning of the statute giving a remedy for injuries received because of a dangerous condition; that it is only conditions peculiar to the mining business that are within the contemplation of the statute.

The evidence of appellee, of Joseph Runyan and of the assistant mine manager leads to the conclusion that a condition existed such as is described by appellee, although possibly the hole at the edge of the horse back was not

~~as deep as the decline as much as testified to by appellee.~~

The legal proposition contended for by appellant has been decided by the courts adversely to its contention. The words "any dangerous conditions" in the Mining Act, "apply to dangerous conditions in the track, the road-bed or the sides of the entries, and that they include any dangerous conditions which may exist in a coal mine which endanger the life, limb or health of men working in the mine, whether such conditions are of a permanent character, due to faulty construction, or of a temporary character, due to operation".

"It is obvious that a dangerous condition of a railway track, whether arising from its disrepair or obstructions upon it, is a physical condition which makes dangerous the working place of those engaged in driving cars over it.

The conditions and hazards under which the transportation of coal is conducted are different from the conditions prevailing in transportation, elsewhere, and men engaged in such occupation constitute a class by themselves." *Hengelkamp vs. Consolidated Coal Co.*, 259 Ill. 305; *Mortons vs. Southern Coal Co.*, 235 Ill. 540; *Dunham vs. Black Diamond Coal Co.*, 239 Ill. 457. The construction placed on the statute in the cases cited is that a dangerous condition in the road bed is within the contemplation of the statute

~~It is also insisted that instruction Number nine given at the request of appellee is misleading. It is not a directory instruction. The instruction told the jury that a Mine Examiner had no authority to determine that a place is not dangerous contrary to the fact; that the mine examiner in good~~

faith thought the place was not dangerous ^{was} not an excuse for failing to mark a place dangerous if it is in fact dangerous. ~~This statement of the law is approved in Cook vs. Big Muddy Mining Co., 249 Ill. 41; and Eldorado Coal & Coke Co. vs. Swan, 227 Ill. 588.~~

~~It is also argued that the court erred in refusing to give appel-~~
~~lant's requested instruction Number 20 concerning the impeachment of witness~~
~~es by contradictory statements.~~ The appellant insists that because appellee continued to work for appellant about two weeks after he claims he was injured and told the mine manager that he had rheumatism, that this was contradictory of the fact that the rim of the hip joint was broken on December 28, ~~by a cap jerking him into the hole~~ as is now claimed by appellee.

Immediately after the accident, appellee told a miner, who worked in an adjoining room, and who had inquired of appellee what was the matter with him, about the occurrence. The leg swelled up right after the accident and remained swollen, and appellee only told what Dr. Hundley had said was the trouble with his leg. ~~There was but a scintilla of evidence as a basis for giving the instruction. While the instruction might properly have been given; its refusal under all the evidence was harmless error.~~

It is also contended that the appellee could not have remained at work ^{as} ~~and done the work~~ he did for two weeks, if he had received the injury [^] on December 28, and from which the evidence shows he now suffers. Three

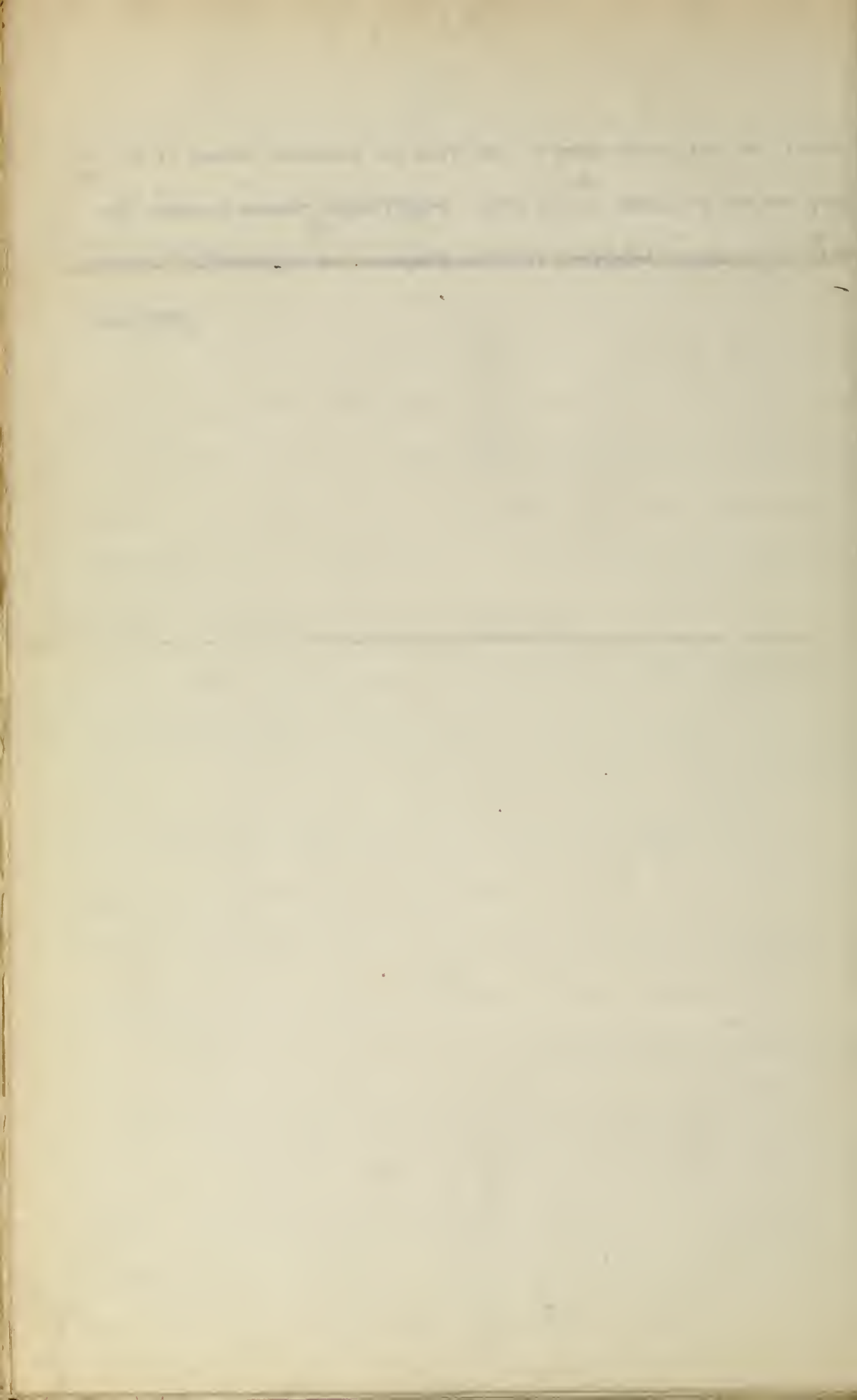
physicians as experts, on behalf of appellant, testified that the appellee could not have performed the work and got around as he did, if the hip joint was dislocated and the rim of the joint broken. ^{The evidence shows} That the appellee's hip was badly swollen and that he suffered great pain from that date is proven by the evidence; that he went to a physician, a day or two after the accident, who advised him that he was suffering from rheumatism caused by a wrench of the joint; that he ultimately quit work because of the pain and that he continued to visit doctors until the actual nature of the injury was discovered by a more thorough examination made by the physicians ~~appear to be clearly demonstrated by the evidence.~~ ~~It is notorious that the theories and evidence of experts is frequently at variance with the actual facts as demonstrated by experience.~~ This court cannot say that a verdict in favor of appellee is against the manifest weight of the evidence.

It is ^{claimed} ~~also argued~~ that counsel for appellee ~~made~~ ^{by} improper remarks in their argument ^{led} to the jury. ~~The remarks which it is insisted were erroneous were concerning the dangerous nature of the work of coal miners and the safe guards that the law has provided for miners.~~ ^{them} ~~We do not find anything innuendo or objectionable in the argument.~~

~~It is also assigned for error that the verdict is excessive.~~ The appellee at the time of the injury was 36 years of age and was earning \$50 every two weeks, ^{and} He has been unable to work for over two years. He has suffered great pain, and his leg is now nearly two inches shorter than the

other. He will suffer more or less from the permanent nature of his injury for the remainder of his life. ~~Insufficient reason is shown why this court should interfere with the judgment, it is therefore affirmed.~~

Affirmed.



707

Gen. No. 2007.

October Term 1914.

17. 201

Filed April 16, 1915-

William Johnson,

Appellee,

vs.

Appeal from Ills.

The Chicago & Alton Railroad
Company,

Appellant.

193 I.A. 632

Written by Thompson, J.

con by

William Johnson brought this suit in case against the Chicago & Alton Railroad Company to recover damages for personal injuries received to have been sustained through the negligence of defendant. A jury returned a verdict in favor of plaintiff for \$5,000 on which judgment was rendered.

The defendant appealed

The syllabus shows that appellant's railroad running west from Madison crossed the Illinois river at right angles after passing through the village of Earl about half a mile west of the river. On the north side of the railroad track about midway between the village and the river the appellee owns and operates a rock crusher. There is a high rock bluff north of the railroad the south end of which terminates near the crusher. There is a gravel pit on this bluff, crushed and used by appellant for ballast. About 150 yards west of the crusher, a side track leaves the main track on the north side and this track runs easterly near the tracks about 100 feet west of the crusher building. These tracks curve to the north and run on the east side of and substantially parallel with the crusher building. The southeast corner of the crusher building is 75 feet from the main track and

is the part of the building nearest to that track. After they entered track the crusher building they continue on in a north easterly direction. The most westerly of these switch tracks is called the crusher track, the other is called the screenings track. A public highway leaves the village of Vaux and runs in an irregular course in an easterly direction on the south side of the railroad track about 30 yards from it and approximately parallel with the track, until it reaches a point south of where the switch track branches from the main track. There it divides and one road runs on east, the other runs north easterly and crosses the main track in a diagonal direction at a point where the distance between the center of the main track and screenings track is about 90 feet. The public road continues on towards the northeast substantially parallel with the screenings track. This road is rough and rocky, crosses a creek just before the road branches from that point to where it crosses the railroad it is a steep up grade. After crossing the railroad there is a slight up grade for about 120 yards north-east of the crossing after which there is a rocky down grade for a short distance to a creek. In the triangle between the main track and the screenings track south of the public road appellant had four piles of bridged material consisting of heavy timbers twelve inches square and from eighteen to twenty-two feet long, and smaller timbers and lumber. These timbers were piled parallel with the public highway a very few feet from it, but on the right of way of appellant. So far as the evidence now shows, the public highway is simply the travelled roadway or wagon track.

South of the screenings track and south of the west end of the crusher house, was a pile of screenings which had been shovelled from cars of screenings, when there was a shortage of screening cars. The distance between the public road and the nearest side of the screenings was about twenty feet. South of the east end of the crusher building and about twenty-five feet north of the public road was a steam box on the right of way of Appellee. This box was about thirty inches square and extended nine or ten feet above the ground. Its use was to discharge exhaust steam into the air.

There was also a locomotive and caboose in attendance on the crusher which were known as the ballast train. The appellee is a farmer living north of the crusher plant. The village of Pearl was his trading place and his route to and from the village was past the crusher plant on this road crossing the railroad. On the morning that he was injured, he drove to Pearl a team of horses hitched to a lumber wagon with both end gates out, to get some two by fours and corrugated iron roofing. On his way home the team, after crossing the railroad ran away and, just after crossing the culvert north of the crusher, threw appellee out of the wagon, breaking his leg.

The negligence averred in the first count is that while appellee was driving across appellant's track near the rock crusher, it negligently and carelessly rang the bell and blew the whistle on its locomotive near the horses which were frightened thereby, etc.

The second count avers that appellant negligently drove his car north of the crossing on the line of the highway a large pile of timber six feet high and while appellee was driving on the highway across the railroad, appellant negligently rolled one of the large timbers off the top of said pile to the ground "upon and along the west line of the said public highway", near and toward the horses and thereby frightened them etc.

The third count avers that appellant was negligent in unloading from a car, crushed rock and pulverized stone on the ground along and upon the line of said public highway, toward the team driven by appellee so that dust arose and frightened the horses.

The fourth count avers negligence in permitting steam to escape with great noise from the steam exhaust box near the line of the public highway towards the team which thereby became frightened. The fifth and six counts are combinations of the averments in the other counts.

There is a serious conflict in the evidence as to the action of the horses during the morning before the accident. One witness testified that the team was frightened on the road to Pearl before it got near the engine. Appellee got ~~thirteen miles off the by~~ ^{scuttling. got some lumber from a} ~~road, twenty feet long in~~ a freight car at Pearl. He testified that his horses did not take fright while he was at the car. Two disinterested witnesses testified that the team was frightened and jumping as he drove away from the car. After getting the ^{lumber} ~~scuttling~~ in the wagon appellee drove to the depot ^{and got two bundles} ~~to see the~~ corrugated iron

roofing. ~~There were two bunches of the iron roofing~~ ~~about twelve feet long and two feet wide.~~ One of the bunches was loose, the clamps being broken. Three witnesses testified that the horses were lunging and acted frightened from the noise made in loading the iron, while appellee testified that the team was not frightened while at the depot. Between the depot and the railroad crossing appellee stopped his team and tied the lead to the wagon bed and also picked up from the road two pieces of rock, each weighing about twenty-five pounds, and put them on the top of the load, he says to keep the load from slipping backward and forward and appellee argues to keep it from rattling.

Appellant testified that just as the horses crossed the track five men were standing on one of the piles of timber and that they rolled a large timber twelve or fourteen inches square and sixteen feet or more in length off the top of the pile eight feet high, to the ground, to the front of and within five feet of the side of the near horse; that the near horse jumped against the off horse and started to run east and that a train came from the east on the main line whistling and ringing the bell; that a man was shoveling screenings out of a car on the screenings track and the wind blew dust across the track on the horses, and made them run harder and that steam was puffing out of the exhaust pipe and settling over the road and that made the horses crazy.

Appellee is corroborated as to the rolling of the timbers off the

pile by the side of the horses by a witness Knox, a cousin of Gravelle, who was running the friction hoist on the top of the crusher. He testified that there were two men on the lumber pile who rolled a timber to the ground when the team was passing by it. He is discredited by, among other things, a written statement made by him shortly after the accident, in which he says he saw a gang of men on the pile of timbers at the crossing near the crusher and stated, "I will not say bridge men were rolling or moving timbers when he came up but they were on the pile". Another witness, Brannough also testified that he was at work in the crusher and saw Johnson with his team approach the crossing and two of the bridge men, who were on the pile of timbers with cant hooks, roll a large timber off the top of the pile within five or six feet of the left track of the wagon road, which scared the team, but he says the horses were dancing as they approached the railroad. Neither of these witnesses knew of the accident until they were told about it.

six each

There were two gangs of ^{six each} men with push cars taking timbers from these piles to the bridge over the river that morning. ~~There were six men in a gang. Two of these men testify they were on a pile of timbers when a team went by, when the push car had been put off the track ninety feet east of the crossing for a train to go by about ten A.M. and that they did not roll any timber off the pile. The other four men of the gang were at the push car, where it had been taken off the track to permit the train to go by, all testify that no timber was rolled off the pile when the team went by and~~

that they slid the timbers on skids from the pile to the push car. ~~None of~~
~~these men saw the runaway or knew anything about it until they were after-~~
~~wards told about it.~~

~~The accident happened about ten o'clock in the morning. A witness~~
~~Virgil Hoover was permitted to testify that he drove by these timber piles~~
~~in the afternoon of that day, and that there were timbers off the piles lying~~
~~in the roadway. This evidence was incompetent and irrelevant. So far as~~
~~the count averring the frightening of the team by rolling timbers off the~~
~~top of the pile by the side of the team as it went by, the fact that timbers~~
~~might be in the road off the pile several hours later is not corroborative~~
~~of the averment that the timbers were rolled off as the team was passing.~~
~~The issue is, was a timber rolled by the side of the team as it passed.~~
~~Counsel for appellee insist that this evidence was rendered competent~~
~~by the evidence admitted on the part of appellant that the men did not at~~
~~any time that day roll any timbers off the pile. The evidence should have~~
~~been confined to the time that the accident happened. The admission of im-~~
~~proper evidence, without its being objected to, is not a legal reason for~~
~~admitting evidence over objection to rebut the improper evidence. Maxwell vs~~
~~Durkin, 185 Ill. 546. The bridge gangs were moving the timbers and the sit-~~
~~uation was continually changing. The admission of this improper evidence in~~
~~view of the conflict in the evidence was reversible error.~~

~~One of the contentions of appellant is that appellee was not in the~~

exercise of due care in that an eight year old set of harness was used on a lively team. Appellee proved by a son of his, that the son hitched the team up that morning. It appeared in the evidence of another witness that a piece of leather strap resembling a broken line was picked up after the accident in close proximity to the place. Appellant, on cross examination of Johnson's son, undertook to show the condition of the harness after the accident and that part of the lines were then missing. An objection was properly sustained to this question for the reason it was not cross examination. Although it would have been pertinent to show the condition when the horses were hitched up.

It is contended that the court erred in modifying an instruction requested by appellant. The instruction as given ^{was} ~~is~~ "You are further instructed that if, on the occasion under investigation, the plaintiff's team was excited, nervous, or alarmed by reason of, and on account of, the noises made by the articles he was carrying in his wagon, and that while such team was in that condition the plaintiff came upon the right of way of the defendant, on which right of way, of the defendant, the defendant was carrying on its own business in a proper and usual way, and that on account of the excited condition of said team, so caused by said noises, or by other cause, for which the defendant or its servants was not responsible, said team took fright and ran away, should find for the defendant."

The modifications ^{with} ~~claimed of~~ are the insertion of the words, "or

its servants" and the erasure after the words "ran away of the words "on account of such proper and usual conduct of the defendants business in its own right of way you."

~~It is argued that the addition of words "or its servants" was unnecessary and do not state the law correctly. It is only acts done by servants in the line of their duty or in furtherance of the master's business for which the master is liable, but there was no issue or contention that the employees of appellant did anything not in the line of their duty and while that part of the instruction did not technically state the law fully on that question it could not mislead the jury. The words erased are misleading as to the negligence charged in the second count and the instruction is abstract and makes no reference to the evidence. The public had rights on the public highway where it crossed the right of way of appellant. If the appellant rolled a heavy timber off a pile close beside the travelled track on the public highway by the side of and within five to seven feet of a team being driven along the public highway, then it was a question for the jury to say from the evidence, whether such act was unreasonable in character or pale at such time or under such circumstances as to amount to a wilful disregard of the rights of a traveller on the highway. Chandler vs. I. C. R. R., 203 Ill. 259. Davis vs. Pennsylvania R. R. Co. 12 A. R. 1. (N. S.) 1159. This instruction was abstract and was substantially given in appellant's seventh given instruction.~~



Appellant's instruction 8, as modified by the insertion of the words "and not from the negligent acts of defendant or its servants as charged in the declaration." ~~The insertion of these words might mis-~~lead the jury in that they might understand the defendant was required to prove the injury was not caused by its negligent act; unless the jury believed from the evidence that the injury was produced by the negligent act or acts of appellant the verdict must be for appellant.

~~While complaint is made of other modifications and the refusal of certain instructions we think the jury were fully instructed and that no useful purpose will be served by reviewing every criticism made. Because of the admission of improper evidence the judgment is reversed and the cause remanded.~~

Reversed and Remanded.

Rehearing denied May 26 1915-

705

Gen. No. 6299.

October Term 1914.

Ag. 61.

Filed April 16, 1915-

Lucinda Arkley, Administratrix of
the Estate of John R. Arkley,
deceased, Appellee.

vs.

William C. Niblack, Receiver of the
Bering Coal Company, Appellant.

Appeal from Verdict.

193 I.A. 636

Opinion by Thompson, J.

~~This is an action on the case begun by Lucinda Arkley, administra-~~
~~trix of the estate of John R. Arkley, deceased, against William C. Niblack,~~
~~Receiver of the Bering Coal Company, to recover damages under the Mines and~~
~~Miners Act for the death of John R. Arkley, caused by a portion of the roof~~
~~of a room falling on him while he was at work as a coal miner in the Bering~~
~~Coal Company's Mine on May 24, 1912. Two trials resulted in verdicts in~~
~~favor of the plaintiff. The last verdict was for \$5,000. The defendant~~
~~prosecutes this appeal from the judgment rendered on that verdict. The~~
~~defendant appealed.~~
~~declaration contains four counts. Each count avers that the appellant had~~
~~filed notice with the State Bureau of Labor Statistics of its election not~~
~~to pay compensation as provided for by the Compensation Act. The first~~
~~count avers that the deceased was on May 23, 1912, working for appellant as~~
~~a coal miner in a certain entry; that there was a large loose and dangerous~~
~~rock in the roof of his working place; that on that day, deceased through~~
~~his buddy, demanded of appellant's mine manager certain props and coal~~
~~pieces and appellant wilfully failed to furnish the same, and that on May~~

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24, while the deceased was at work in the room, the rock fell upon him and caused his death.

The second count contains the further allegation that the loose rock was resting on another rock whereby it was made dangerous.

The third and fourth counts aver in different language the duty of the mine examiner to examine the underground workings of the mine within twelve hours preceeding every day upon which the mine is operated; that the mine examiner did examine the room and reported it safe in the book provided for that purpose; that the roof was in a dangerous condition at the time and appellant knowingly and wilfully neglected to observe said dangerous roof and mark it dangerous.

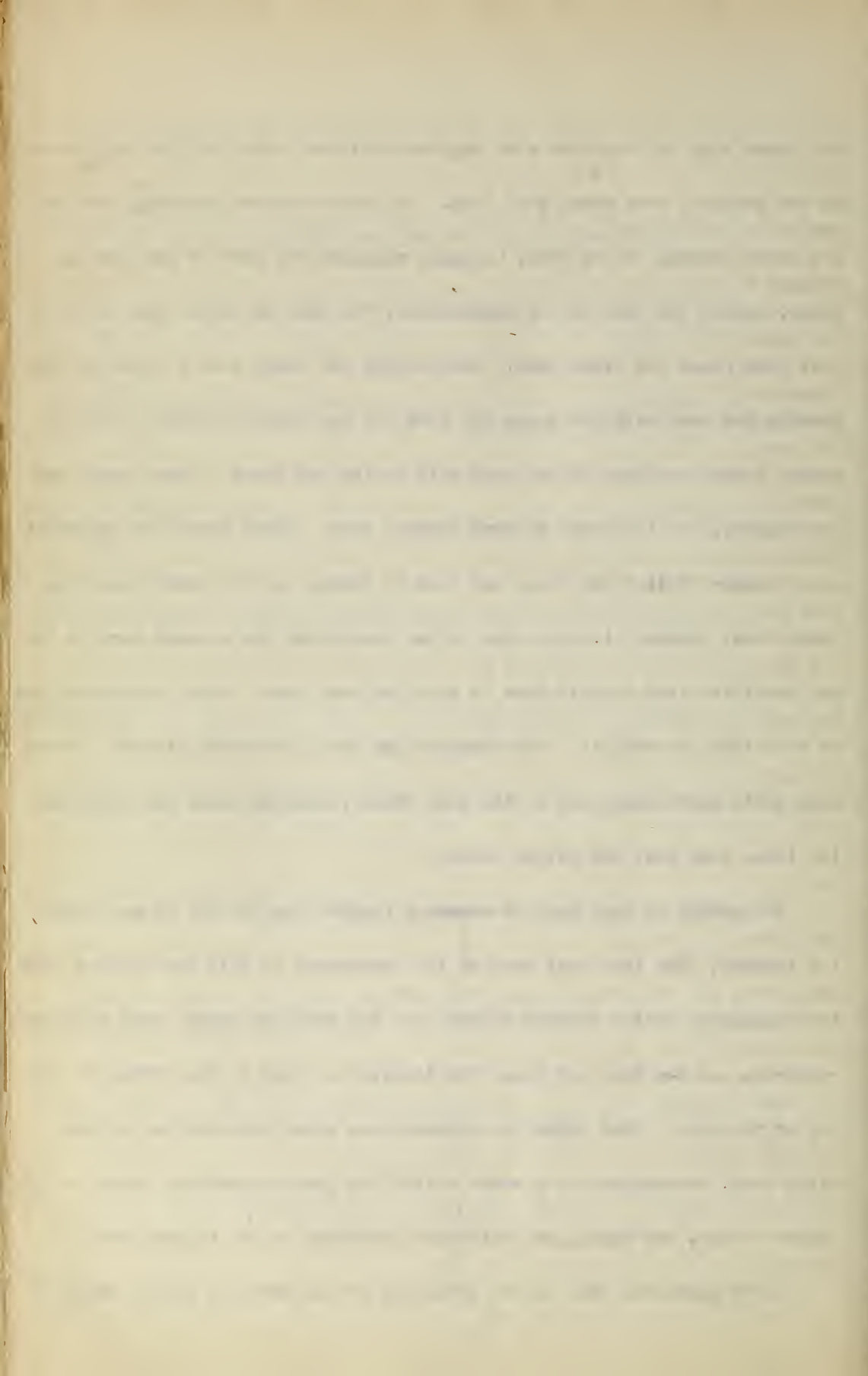
~~The first contention of appellant is that the judgment cannot be~~
~~sustained on the evidence.~~ The evidence shows that ~~Willey and Henry Moody,~~
~~his buddy, were at work in the sixth South West entry of the mine, which had~~
~~been driven about fifty feet beyond the last cross cut.~~ About 1:30 on the
morning of May 23d, the mine examiner made an examination of the working place
of deceased and found a loose rock on which he placed a danger mark. When the
deceased and Moody went to work on the morning of the 23d, the assistant mine
manager, who was the day inspector, told them about the loose rock and in-
structed them to fix it. They tried to get it down and removed part of it,
including the part with the examiner's danger chalk mark on it. They then
went on with their work of mining. Moody testified that he tried to prop



the loose rock but that the work required six foot props and the only props in the vicinity were seven foot long. The mine examiner testified that in the early morning of the 24th, he again examined the roof of the working place, marked the date of the examination, but made no danger mark as he at that time found the place safe. When Arkley and Moody went to work on that morning the rock with the dates May 23rd and May 24th had fallen. The deceased tested the roof of the room with a pick and found a loose rock over the roadway, but they went to work loading coal. About 10:30 the assistant mine manager visited the room, was told by Arkley and his buddy about the loose rock, sounded it, told them it was unsafe and put a cross mark on it and testified that he told them to take the rock down. Moody testified that he told them to watch it. The deceased and Moody continued at work loading coal until near noon, when a side rock which projected under and supported the loose rock fell and killed Arkley.

The method in that mine of ordering timbers was for the miners requiring timbers, when they quit work in the afternoon, to fill out tickets with the dimensions of the desired timbers and the room and entry where they were required, and ~~the~~ date and place the tickets in a box in the office at the top of the mine. That night the tickets were taken from the box by the night boss, transcribed to a sheet called the timber sheet and hauled to the timber hauler, who then made deliveries according to the timber sheet.

Moody testified that on the afternoon of the 23rd, he filled out a



timber ticket for some six foot props for the sixth South West entry and placed it in the timber box as he went by the office; that the appellant failed to deliver any timbers in pursuance of this demand and that the only timbers in the vicinity were some seven foot props in front of the cross cut. The night boss testified that he took the tickets out of the box that night, transcribed them to the timber sheet and placed the tickets in an envelope. The appellant offered these tickets and the timber sheet in evidence. There is no ticket among them made out by Moody. The mine manager and three other witnesses testified that about two hours after the accident, there were five props lying by the cross cut, three of which were seven feet long and two six feet and an inch or two. John Burton testified that he was in the room immediately after the accident and that if the loose rock had been propped, the side rock would not have fallen; that there were no six foot props in the vicinity but there were some seven foot props about 50 feet distant. Two other witnesses testified there were no six foot props there; one of these witnesses also testified that he was present after the accident, when the employes of appellant measured the props in the vicinity and that they were all seven foot props.

The evidence of both parties would appear to show that only part of the rock that was loose and marked dangerous on the 23d was removed and that there was loose rock over the roadway on the 24th, when the mine examiner examined the working place of the deceased and that it was not marked dangerous. If the mine examiner had marked the rock dangerous and recorded

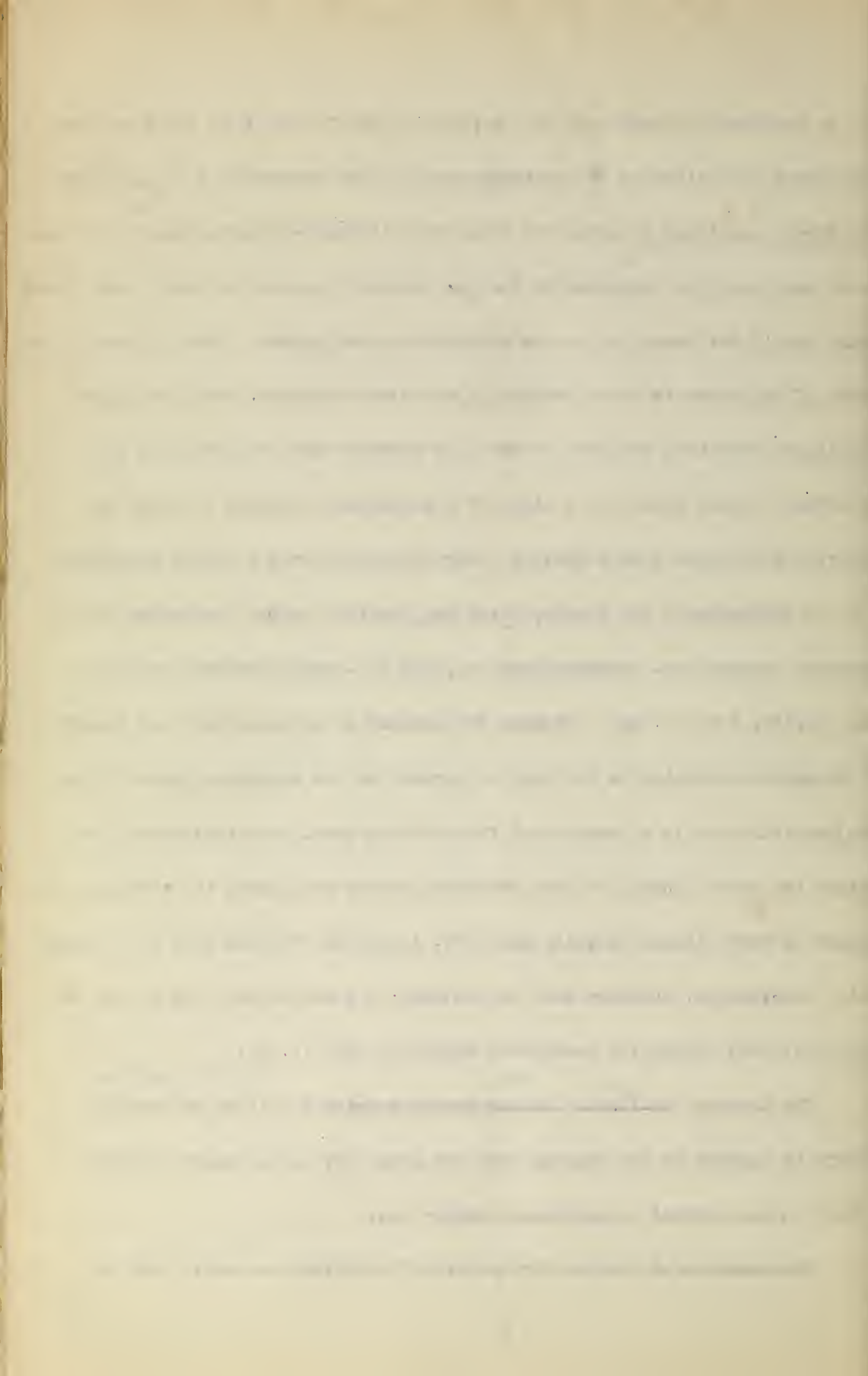
it as required by Section 21 of the Miner's Act of 1911, then the mine manager would have withheld the entrance check of the deceased and he would not have been permitted to enter the mine until it was made safe, except as a company man under the direction of the mine manager to make the place safe. Under the Miner's Act there can not be contributory negligence. Want of care on the part of the miner is not a defence to an injury received, when the injury would not have been received if the mine operator had complied with the statute. Actual notice to a miner of a dangerous condition will not relieve the operator from liability, where there has been a wilful disregard of the provision of the statute which was enacted for the protection of miners. *Mertens vs. Southern Coal Co.*, 235 Ill. 540; *Henrietta Coal Co. vs. Martin*, 221 Ill. 460. Whether the failure to properly mark and report a dangerous condition in the roof of a room was the proximate cause of the injury to a miner is a question of fact for the jury, notwithstanding the miner had actual notice of such condition before he entered the room and began to work without propping the roof, a portion of which fell and injured him. *Mertens vs. Southern Coal Co. (Supra)*; *Brunnworth vs. Kerens Coal Co.*, 260 Ill. 202; *Tomasi vs. Donk Bros. Coal Co.*, 257 Ill. 70.

as to the *of the appellant*
The evidence ~~applicable to the counts averring a failure~~ to furnish

props on request of the deceased and his associate is in direct conflict.

There is no manifest preponderance either way.

~~The question of whether the failure of appellant to comply with the~~

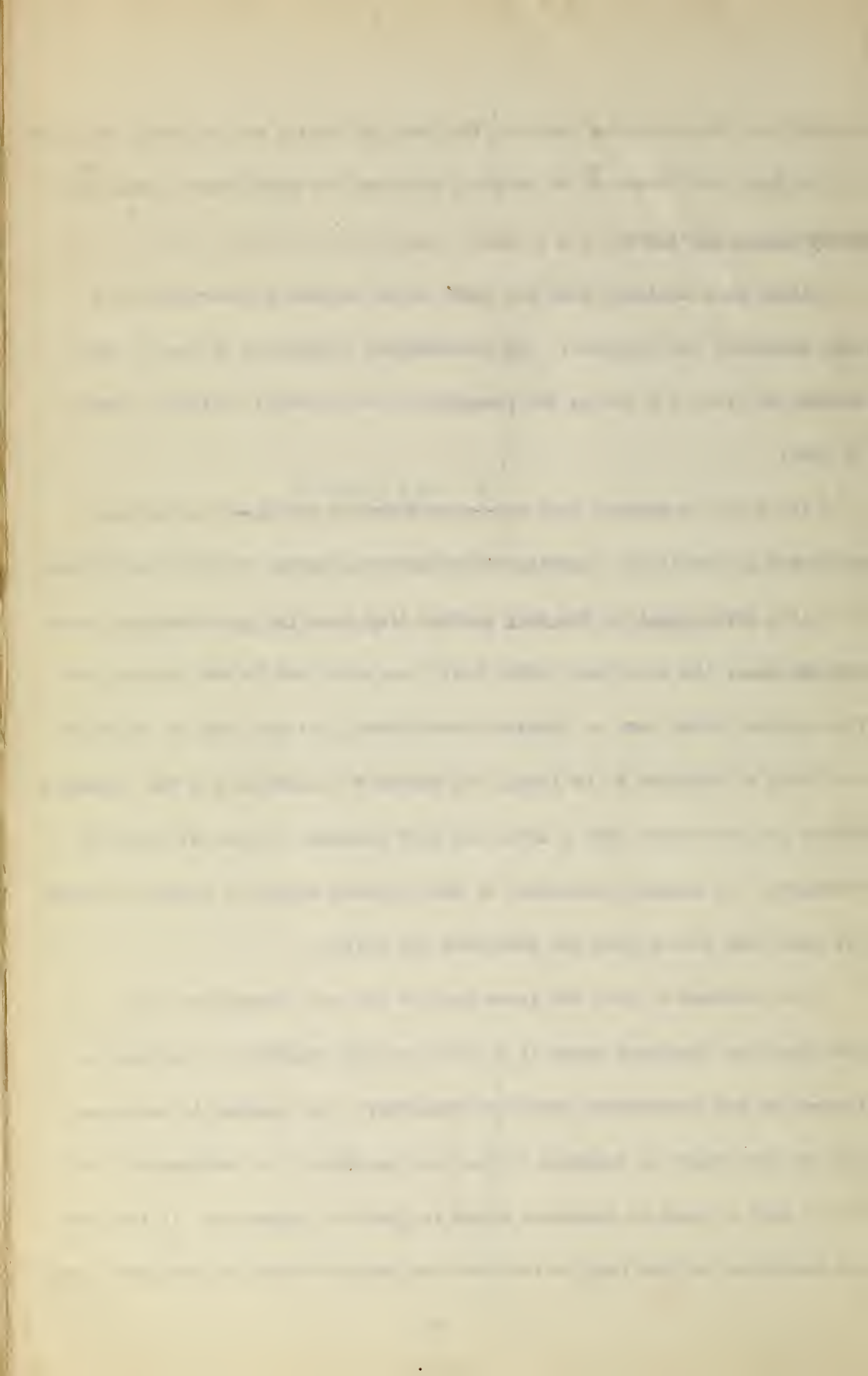


statute was the proximate cause of the death of Arkley was properly submitted to the jury, and there was no error in refusing the peremptory instructions requested by appellant.

It is also insisted that the court erred in giving instructions at the request of the appellee. The instructions complained of are not peremptory in form, and are in the language of the statute; we find no error in them.

It is also contended that ^{it was error to} ~~the court erred in refusing~~ instructions requested by appellant, ~~Appellant's instruction number 13 which was refused~~ ^{is} to the effect that if the jury believe that when the mine examiner examined the room, the side rock, which fell, was solid and in the judgment of the examiner there were no dangerous conditions, and the rock in the roof was known by deceased to be loose, and before the accident the day inspector marked the loose rock with a cross and told deceased to take it down and thereafter the deceased continued at work without taking it down or propping it, then they should find the defendant not guilty.

The evidence is that the loose rock in the roof caused the side rock that was bracketed under it to fall and that feature of the case is ignored by the instruction which is peremptory. The statute is mandatory and the good faith or judgment of the mine examiner is no defence to a failure to mark a place as dangerous which in fact was dangerous. If the rock was dangerous and had been so recorded the deceased with his assistant would



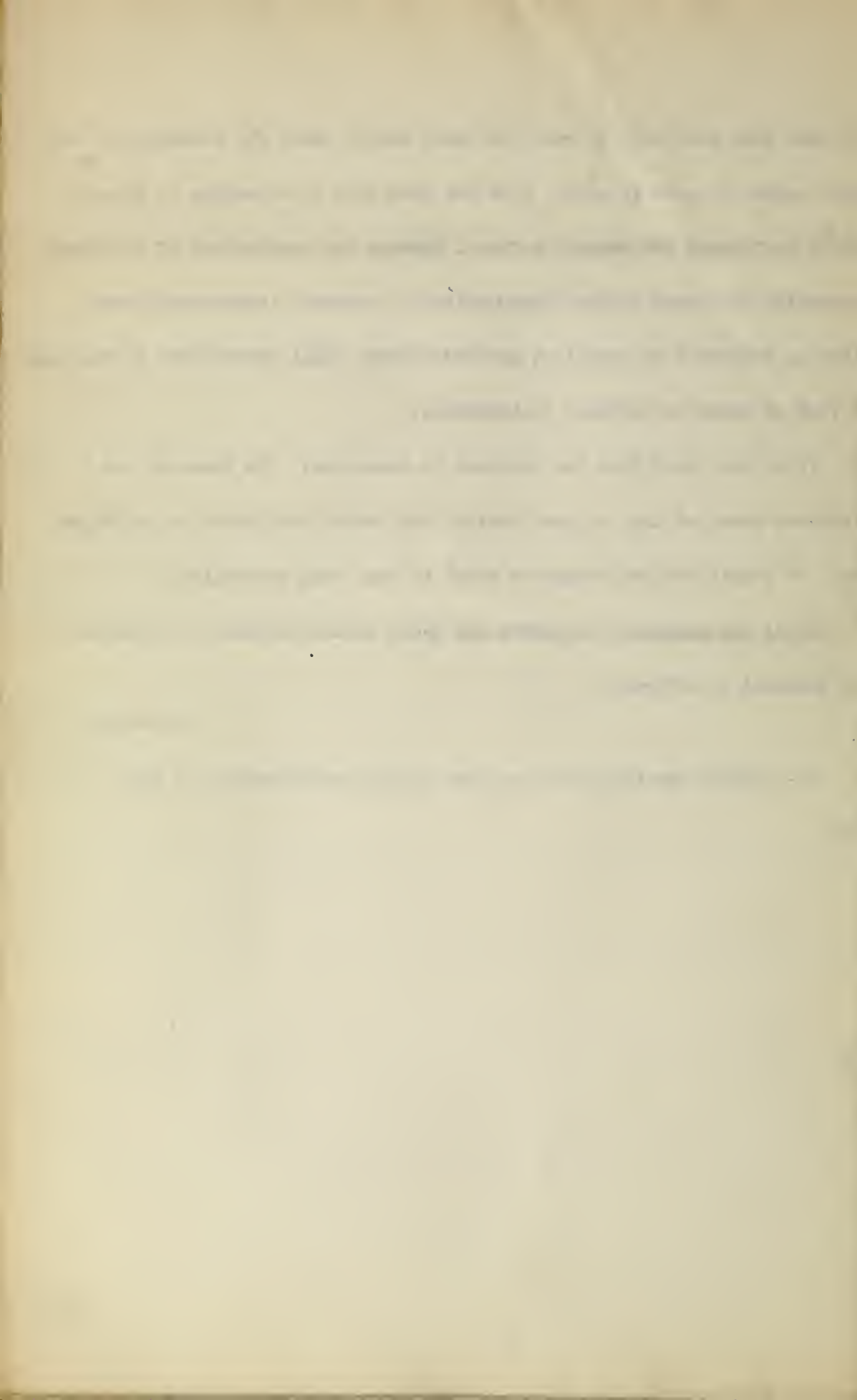
not have been permitted to enter the mine except under the direction of the mine manager to make it safe. What has been said in reference to contributory negligence not being a defence, answers the contentions of appellant concerning the other refused instructions. Seventeen instructions were given as requested by appellant and cover every legal proposition in the case. We find no error in refusing instructions.

It is also said that the judgment is excessive. The deceased was fifty-two years of age, in good health, and earned from \$4.00 to \$4.50 per day. We cannot see any reason on which to base such contention.

It is not necessary to review the cross errors assigned by appellee. The judgment is affirmed.

Affirmed.

Mr. Justice Schofield took no part in the consideration of this case.



214 Danville May 26-1915

706

Gen. No. 6313. October Term 1914. Ag. 64.

Amelia Barker, Appellee,
vs.
Danville Street Railway &
Light Company, Appellant.

Filed April 16, 1915-

Appeal from Vermilion.

193 I.A. 639

Opinion by Thompson, J.

~~This is an action on the case brought by Amelia Barker against the~~
~~Danville Street Railway and Light Company to recover damages for injuries~~
~~alleged~~ ^{to have been sustained by her through the negligence of the defen-}
~~dant while attempting to become a passenger on a street car of defendant.~~
^{from a verdict}
~~A jury returned a verdict in favor of the plaintiff for \$500; the defen-~~
~~dant prosecutes this appeal.~~

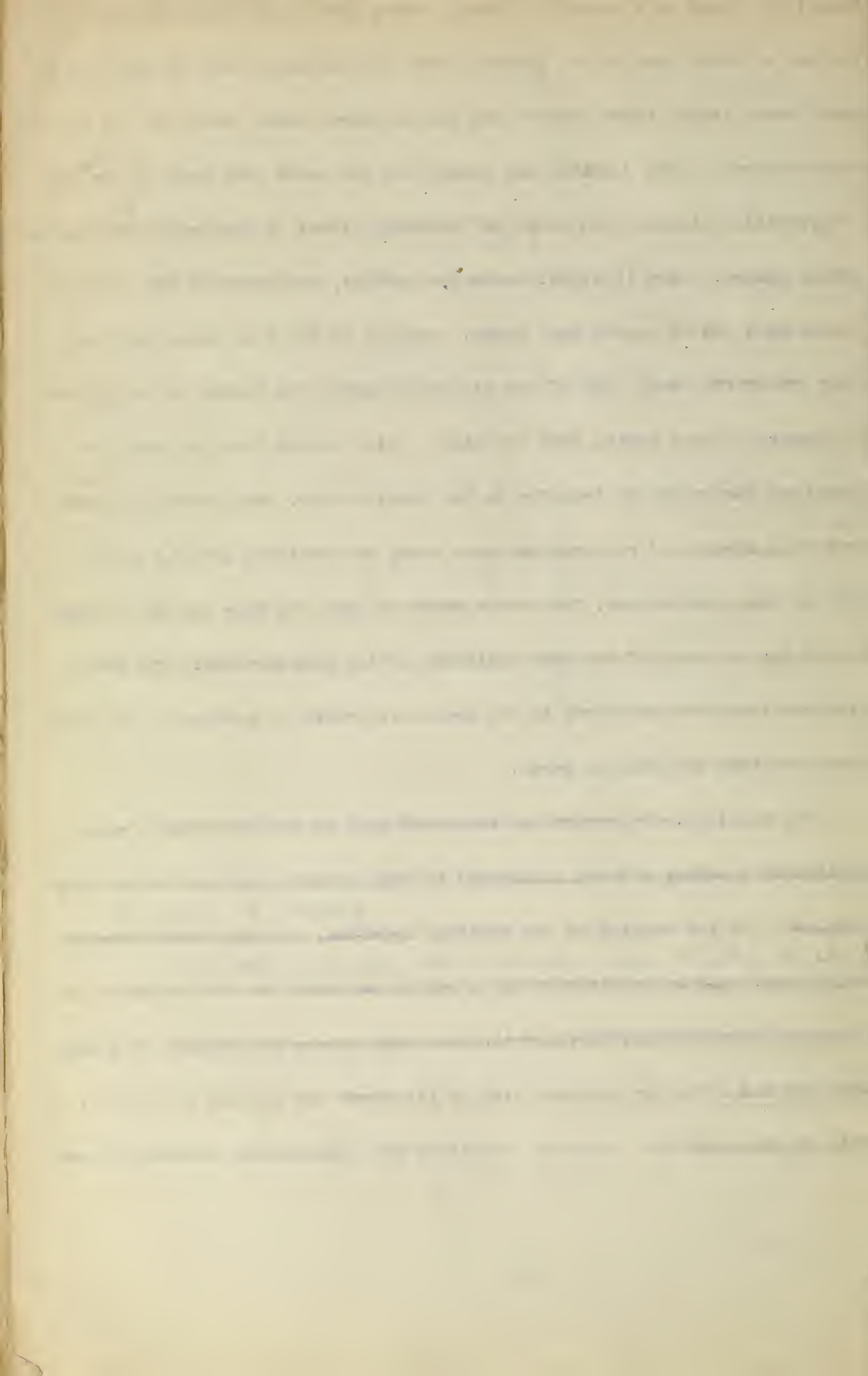
The evidence shows that in the city of Danville, a public square is
in the center of the business district with streets leading from it to the
north, south, east and west. The north and south street is named Vermilion
street and the east and west street is Main Street. The court house is at
the north side of the square and east of Vermilion street. The Daniel
building or Ten-Cent Store fronts to the east on the west side of Vermilion
street, just north of the square. There is a side walk along the north
side of the square across Vermilion street. North of the square in Vermil-
ion Street is a double track street railway which, at the north side of the
public square, by quarter circle double tracks, curves to the east and to
the west on Main street. About 100 feet north of the public square on

ALICE and JOHN DOLPH

1911-12-16

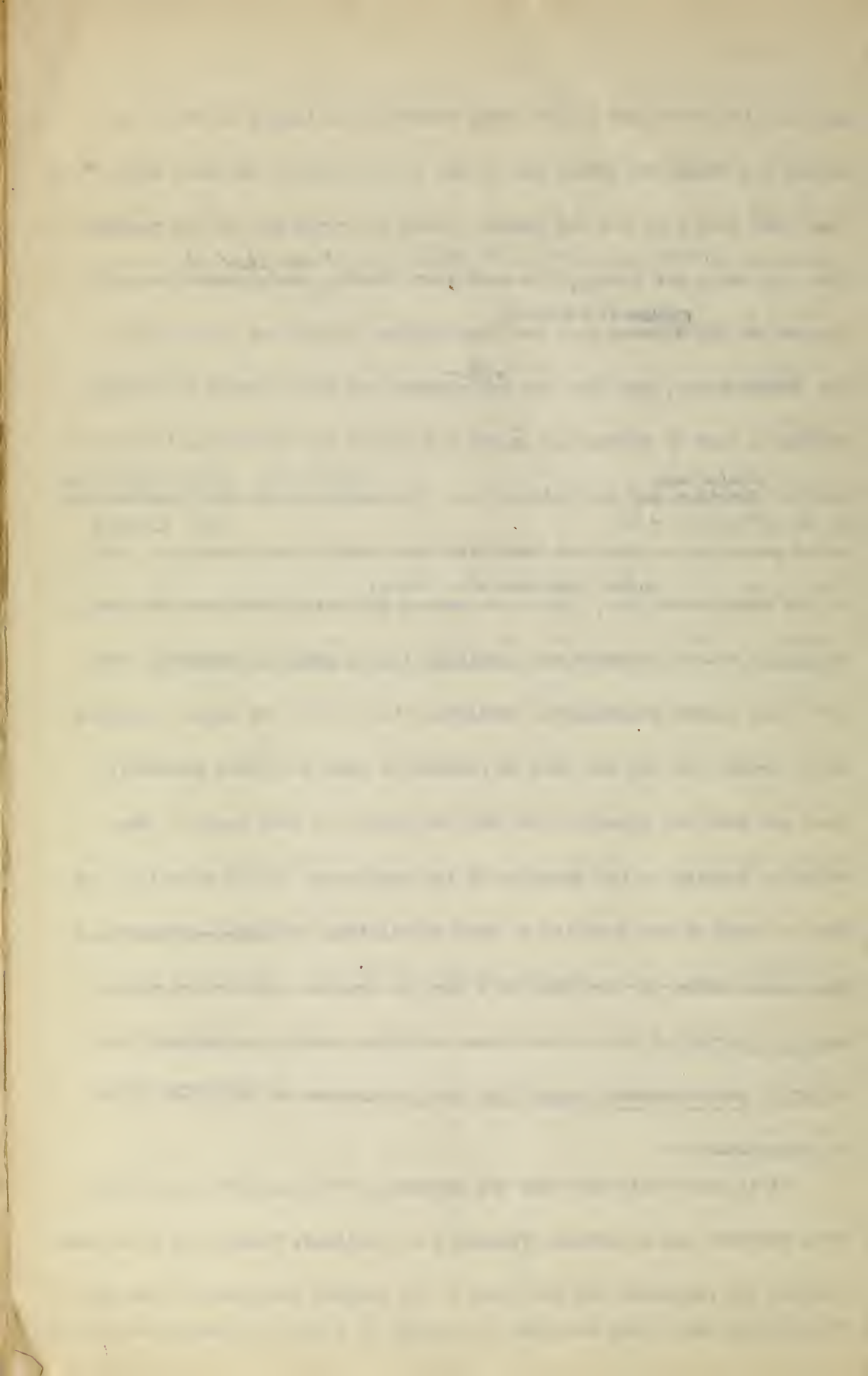
Vermillion street is a cross-over track, where cars coming from the north the run of which ends at the square, after turning back north on the west or south bound track, cross over to the east or north bound track and run north. What is known as the junction car comes from the north east part of the city to Vermillion street, then south on Vermillion street to the west curve on the public square, where it stops, turns its trolley, the motorman and conductor change ends and it starts back north, stopping on the west track with its rear end at the north side of the side walk across the street and waits for passengers on cars coming from the east. Cars coming from the east, if they have passengers to transfer to the junction car, come around the curve from Main street and run upon the east track on Vermillion street, by the side of the junction car, far enough north so that the rear end of the main street car is north of the rear vestibule of the junction car. The junction car then proceeds north to the cross-over where it crosses to the east track and then proceeds on north.

The appellee, ~~who resided in the north part of the city, was a night employe in a bakery and was accustomed to ride towards her home in the junction car.~~ *crossed a street to* On the morning of the accident ~~appellee, who had been in the Ten Lake a street car standing on the melody of two blocks Cent store, came out of it carrying a suit case, north of the junction car,~~ *appellee, who had been in the Ten Lake a street car standing on the melody of two blocks Cent store,* ~~came out of it carrying a suit case, north of the junction car,~~ *appellee, who had been in the Ten Lake a street car standing on the melody of two blocks Cent store,* ~~which was standing just north of the side walk across the street. The junction car had a door on the west side of the north end and one on the east side of the south end. Appellee testified that she started towards the car~~



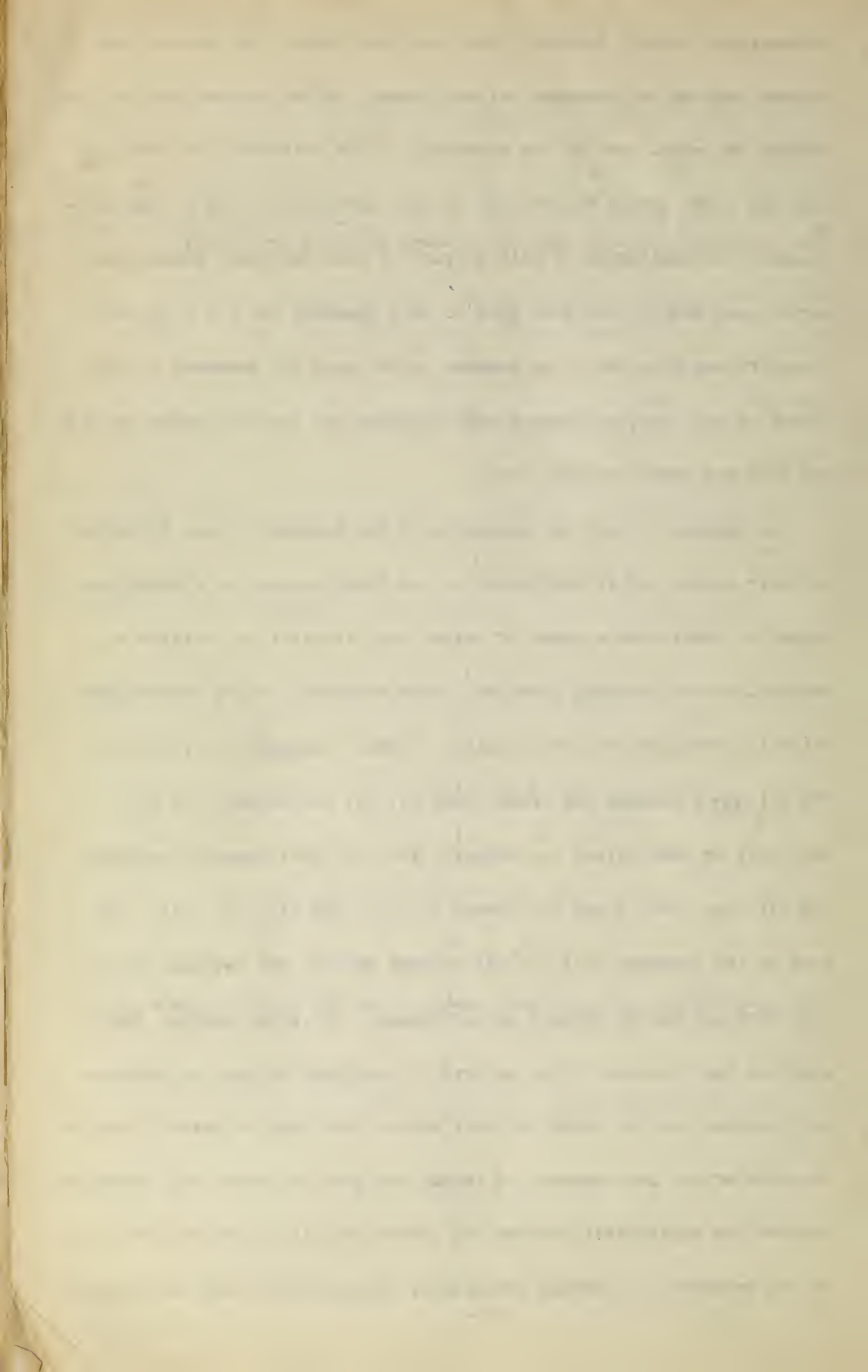
~~and that the motor man in the front vestibule mentioned to her to go~~
~~around the front end of the car to get to the door on the east side of the~~
~~rear end; that when she had passed around the north end of the junction~~
~~car, she saw a car coming from east main street, which slowed down and~~
~~stopped on the square; that she then started toward the rear door of~~
~~the junction car, and that the main street car then started up without~~
~~ringing a gong or giving any signal and caught and rolled her between it~~
~~and the junction car and injured her. The motor man on the junction car,~~
~~as to whether she~~
~~and a passenger on that car testified that they did not hear any gong~~
~~on the main street car. The motor man on the main street car and the~~
~~conductor on the junction car testified that a gong was ringing. The~~
~~motor man on the junction car testified that he did not signal appellee~~
~~to go around the car, but that he reached to open the front vestibule~~
~~door and that she signalled she did not want that door opened. The~~
~~evidence bearing on the question of the negligence of the appellant and~~
~~the due care of the appellee is very conflicting and these questions of~~
~~fact were within the province of a jury to decide. This court cannot~~
~~say on a review of all the evidence, that the verdict is against the~~
~~manifest preponderance thereof and that contention of appellant cannot~~
~~be sustained.~~

It is also contended that the evidence of the appellee should have
been excluded and a verdict directed for appellant, because of a variance
between the pleadings and the proof. The alleged variance is that the
declaration avers that appellee was struck by a car and knocked down on the



pavement and thereby injured, while the proof shows that she was not knocked down on the pavement but was struck, rolled between and held up between the cars. One of the averments of the declaration is "she was then and there struck by said car on said northbound track by the carelessness and negligence of said servant of said defendant signalling her to pass over to the east side of said junction car x x x and the plaintiff was then and there knocked to and upon the pavement of said street by said car, and between said junction car and said other car and was then and there bruised" etc.

In actions of tort the averments of the declaration are divisible in their nature and if sufficient of the facts averred in a count are proved to constitute a cause of action the plaintiff is entitled to recover, notwithstanding there are other averments of the declaration which the evidence does not sustain. *Postal Telegraph Co. vs. Likes*, 225 Ill. 249; *Chicago and Grand Trunk Ry. Co. vs. Spurney*, 127 Ill. 471; *City of Rock Island vs. Guinely*, 126 Ill. 408; *Hammers vs. Knight*, 168 Ill. App. 203; *Hayes vs. Wabash Ry. Co.*, 130 Ill. App. 511. The part of the averment that she was knocked down on the pavement was unnecessary and may be treated as surplusage. The proof showing that appellee was directed by the employe of appellant to pass in front of the junction car and along the east side of that car to enter a door on the side of the car between the tracks and that the other car, which had stopped was negligently started and struck her, is proof of sufficient of the averments to sustain the action, and proof that she was knocked



down on the pavement was not necessary.

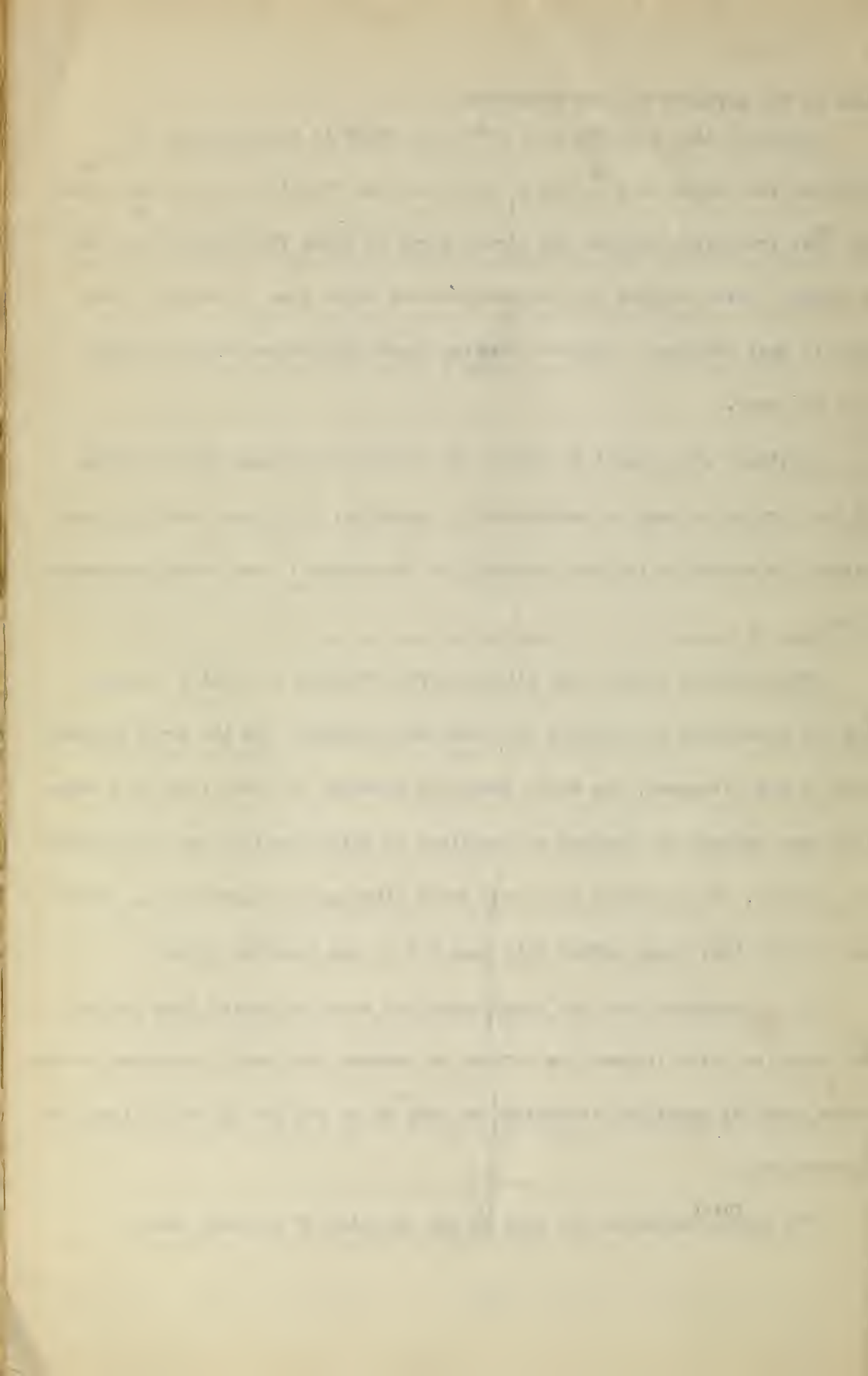
Appellant also contends that the court erred in the admission of evidence introduced on the part of appellee that Vermilion street was paved and that travellers crossed the street north of where the junction car was standing. After arguing the question counsel state that no objection was made to that evidence. There is nothing saved for review where no objection was made.

Appellant also sought to show by Dr. Steely the reason why he called in Dr. Perrigo to make an examination of appellee. The court properly sustained the objection to such evidence for the reason it was simply argumentative.

The appellant called some witnesses from Clinton to testify concerning the reputation of appellee for truth and veracity. On the cross examination of the witnesses, the court permitted appellee to show, that in a criminal case against the husband of appellee, in which appellee was the prosecuting witness, the appellant had given these witnesses transportation. We do not see how that could affect this case but it was harmless error.

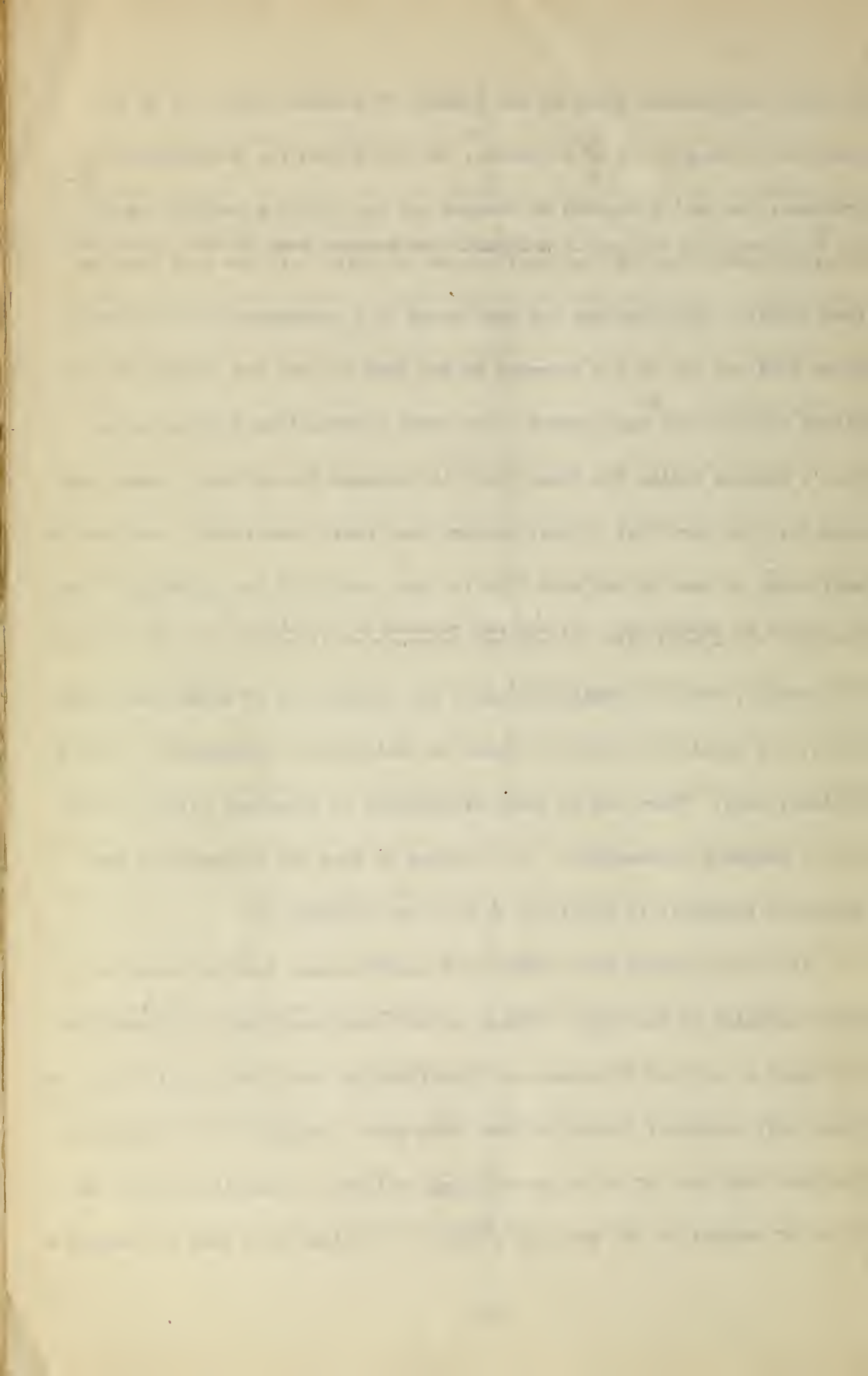
It is contended that the court committed error in giving instructions for appellee which ignored the defence of assumed risk and in refusing instructions asked by appellant informing the jury as to the law on the doctrine of assumed risk.

The court^{fully} instructed the jury on the question of ordinary care.



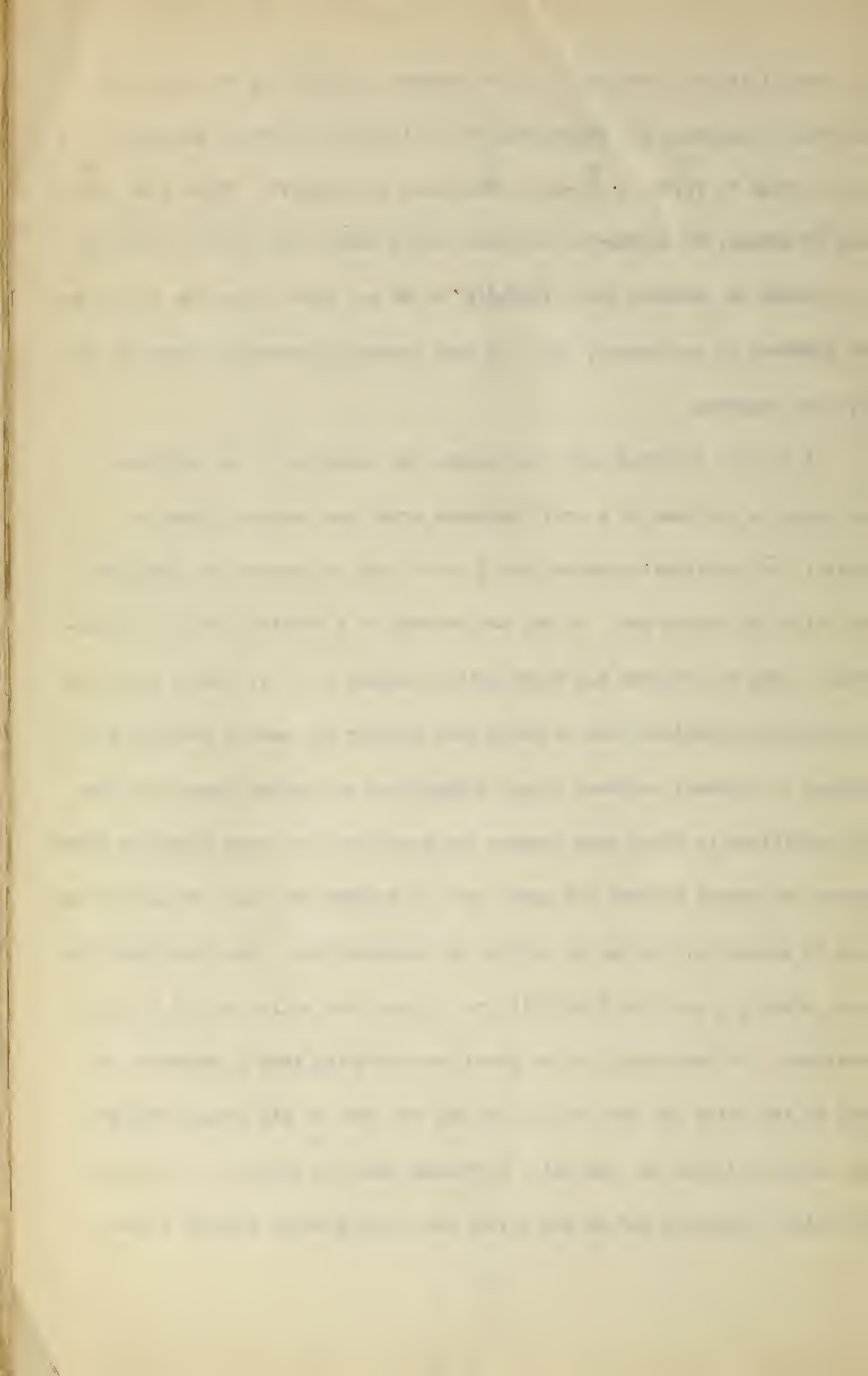
The only instructions given at the request of appellee were, two on the question of credibility of witnesses, one concerning the preponderance of evidence, one on the measure of damages and one defining ordinary care. Nineteen were given for the appellant, two of which tell the jury that before appellee could recover she must prove by a preponderance of the evidence that she was in the exercise of due care for her own safety, at and before the time she was injured. Two other instructions given at appellant's request recite the facts which it contends the evidence proves, and then tell the jury that if they believe such facts constituted contributory negligence or want of due care that the jury must find for appellant. The doctrine of assumed risk is involved in contractual relations such as master and servant, while in negligence cases not arising out of contractual relations, the parallel doctrine is known as contributory negligence or want of ordinary care. There was no error prejudicial to appellant either in giving or refusing instructions. As a matter of fact the instructions were much more favorable to appellant than it was entitled to.

It is also argued that counsel for appellee made improper remarks in their argument to the jury. Counsel stated that appellant, a corporation, had means of getting witnesses and investigating cases that appellee did not have; that statement should not have been made. Counsel also commented on the fact that many of the witnesses were employees of appellant; that was a right of counsel as the jury had a right to consider that fact in passing on



the credibility of witnesses. One of counsel attacked the witnesses who testified concerning the reputation of appellee for truth and veracity, calling them "a flying squadron of character destroyers". While such statement of counsel is subject to criticism and counsel seem to have permitted their ardor to overcome their judgment, we do not think, when the amount of the judgment is considered, that the case should be reversed because of the improper argument.

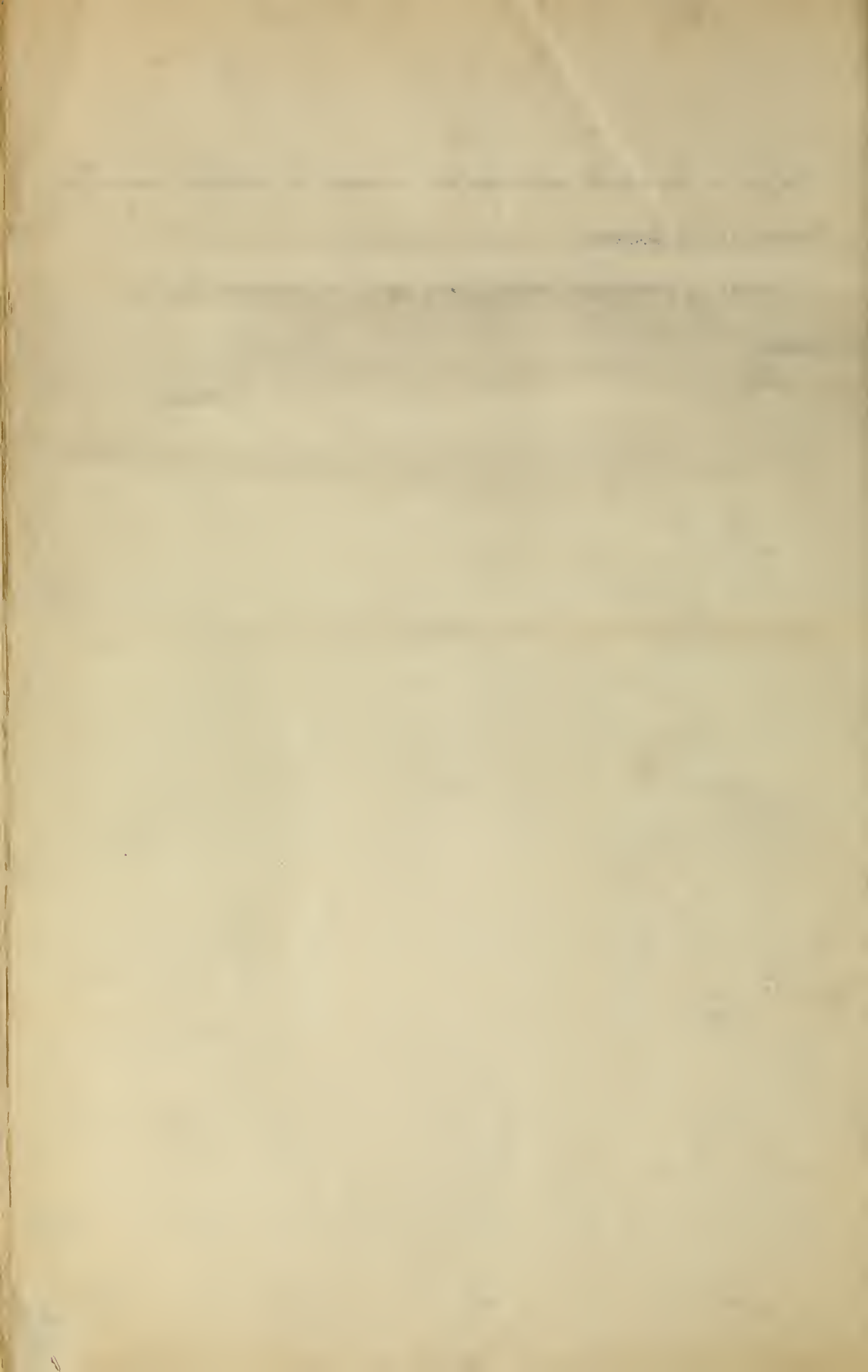
It is also insisted that the damages are excessive. The appellee was taken to the home of a Mrs. Patterson after the accident where Dr. Stealy, the appellant's surgeon and a son of one of counsel for appellant, was called to attend her. He had her removed to a hospital two days thereafter, where he attended her daily until December 17. Dr. Stealy testified on behalf of appellant that he could find neither any marks, bruises, contusions or external evidence of any injury, nor any broken bones, and that the conditions he found were chronic and could not have been caused by being struck and caught between the cars; that he thought she was a malingerer and that he called Dr. Ferrigo to aid him in examining her. Appellee testified that, after she left the hospital, Dr. Baumgart was called on for medical treatment. He testified that he found her suffering from a traumatic injury of the spine and that she was in bed for five or six weeks after the accident was called and that she was still suffering from the injury at the time of the trial. Appellee before the injury was earning seven dollars a week.



We are of the opinion appellant has no cause for complaint concerning the amount of the damages.

There is no reversible error in the case; the judgment will be affirmed.

Affirmed.



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Name

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